TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 397

CHARTER SHIPPING COMPANY, LTD.,
PETITIONER,

vs.

BOWRING, JONES & TIDY, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,528)

(34,528)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 397

CHARTER SHIPPING COMPANY, LTD.,
PETITIONER,

vs.

BOWRING, JONES & TIDY, LTD.

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[fols. a-1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BOWRING, JONES & TIDY, LTD., Libellant,

vs.

CHARTER SHIPPING COMPANY, Respondent

STATEMENT

1928.

July 16. Filed libel and stipulation for costs, issued monition returnable July 31st, 1928.

July 18. Filed stipulation for value, appearance, and stipulation for costs.

July 19. Filed monition, vessel attached and released, 17th inst.

Sept. 25. Filed exceptions to libel and exceptive allegations.

Dec. 3. Filed Notice of Motion to dismiss exceptive allegations and exceptions to libel and to direct Respondent to file its answer within 15 days. Exceptions to the libel sustained. See memo. Endorsed.

Dec. 3. Filed affidavit opposing motion.

Dec. 7. Filed Bill of Costs—$98.82.

[fol. 2]

Dec. 8. Filed order sustaining exceptions to libel and dismissing the libel with costs—$98.82, Thacher, J.

Dec. 20. Filed Order and Notice of Appeal—Coleman, J.

Dec. 20. Filed Assignment of Errors.

Dec. 20. Filed stipulation waiving bond for costs on appeal.

IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel and complaint of Bowring, Jones & Tidy, Ltd., Libellant, against Charter Shipping Company, Ltd., Re-

spondent, in a cause of contract civil and maritime, alleges and respectfully shows to this Honorable Court, upon information and belief, as follows:

First. That at all the times hereinafter mentioned your libellant was and now is a foreign corporation organized and existing under the Laws of the Kingdom of Great Britain.

Second. That the respondent Charter Shipping Company, Ltd., at all the times hereinafter mentioned was and now is a foreign corporation duly created and existing under and [fol. 3] by virtue of the Laws of the Kingdom of Great Britain, and having within this jurisdiction or which will during the pendency of this action have within this jurisdiction, certain goods, chattels, credits or vessels, namely the Steamship "Charterhulme" subject to the jurisdiction of this Court by writ of foreign attachment.

Third. That at all the times hereinafter mentioned the respondent was a common carrier of goods for hire and owned and operated in its said business the Steamship "Charterhague" among others, between various ports, including the ports of Savannah and Brunswick, Georgia, Jacksonville, Florida and London, England.

Fourth. That in the month of September, 1926, at the ports of Savannah and Brunswick, Georgia, and Jacksonville, Florida, the Naval Stores Export Corporation, an American Corporation, delivered to the respondent and shipped on board respondent's vessel, the Steamship "Charterhague,"

4050 barrels of American Turpentine,
300 barrels of American Rosin, and
200 barrels of American Rosin,

for transportation to the port of London, consigned to the order of shippers.

Fifth. That thereupon the agents for the respondent in said ports of Savannah and Brunswick, Georgia, and Jacksonville, Florida, issued and delivered to the said Naval [fol. 4] Stores Export Corporation at said ports of Savannah and Brunswick, Georgia, and Jacksonville, Florida, bills of lading whereby respondent by its said agents ac-

knowledged receipt from the said Naval Stores Export Corporation of said 4050 barrels of American Turpentine, 300 barrels of American rosin and 200 barrels of American rosin to be transported on the Steamship "Charterhague" to the port of London and there to be delivered unto the order of shippers.

Sixth. That thereafter said bills of lading were endorsed and delivered to libellant.

Seventh. That the said Steamship "Charterhague" proceeded on her voyage from the said ports of Savannah and Brunswick, Georgia, and Jacksonville, Florida, with said cargo aboard.

Eighth. That before the said Steamship "Charterhague" arrived at the port of London and before libellant learned the facts of unseaworthiness and improper equipped, manning and supplying hereinafter alleged, respondents' representative advised libellant that though the Steamship "Charterhague" was still at sea, respondent had been advised that libellant's cargo would be liable on account of general average and/or salvage and/or charges and that deposits of £1,252.4.2. with respect to the 4050 barrels of American Turpentine, £49.4.7. with respect to the 300 barrels of American Rosin and £32.14.0 with respect to the 200 barrels of American Rosin or the sum of £1,334.2.9 in all, [fol. 5] would be required in order to release libellant's cargo from an alleged lien of the respondent upon said cargo on account of general average and/or salvage and/or charges.

Ninth. That thereupon libellant made said deposits to Messrs. Francis & Arnold, acting for the respondent, and libellant received three general average receipts acknowledging receipt of said sums as deposits on account of general average and/or salvage and/or charges, being three percent. of the arrived value of said merchandise, which said receipts are in libellant's possession and which libellant will produce on the trial of this action.

Tenth. That subsequently libellant was informed and believes that the SS. "Charterhague" was unseaworthy and not properly equipped, supplied and manned and that

due diligence had not been used to render her seaworthy, properly equipped, supplied and manned at the beginning of her said voyage from Savannah and Brunswick, Georgia, and Jacksonville, Florida, and that therefore libellant alleges that there is no liability on the part of libellant on account of general average and/or salvage and/or charges and that the amounts of the aforesaid deposits are due and returnable to libellant.

Eleventh. That libellant has duly demanded the return of said deposits amounting in all to the sum of £1334.2.9, but the return of the same has been refused except the sum [fol. 6] of £163.18.1 which has been received by libellant under an agreement with respondent that the receipt of said sum of £163.18.1 was without prejudice to libellant's rights, if any, to recover the balance of said deposit of £1334.2.9.

Twelfth. That there is still due and owing to libellant the sum of about £1170.4.8 (approximately Five thousand seven hundred fifty Dollars ($5750.), no part of which has been paid although the same has been duly demanded.

Thirteenth. That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libellant prays that citation in due form of law according to the rules and practice of this Honorable Court in causes of Admiralty and Maritime Jurisdiction may issue against the respondent Charter Shipping Company, Ltd., citing it to appear and answer all and singular the matters aforesaid, and that if the said respondent cannot be found within this District all its goods, chattels, credits or vessels within this District, and particularly the Steamship "Charterhulme" may be attached by process of foreign attachment to the sum of Five thousand seven hundred fifty Dollars, the sum sued for in this libel, with interest and costs, and that a decree may be entered herein in favor of the libellant against said respondent for the amount of libellant's damages, as set forth, together with [fols. 7 & 8] with interest thereon and libellant's costs and disbursements; that the said Steamship "Charterhulme," her engines, boilers, etc., may be condemned and sold to

pay the same, and that the Court will grant to the libellant such other and further relief as may be just.

Theodore L. Bailey, Proctor for Libellant. Office and Post Office address: No. 15 William Street, Borough of Manhattan, New York City.

Duly sworn to by Theodore L. Bailey. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEARANCE

SIR: Please take notice that the respondent, Charter Shipping Company, Ltd., hereby appears in the above entitled action and that we are retained as proctors for it herein.

Dated New York, July 17, 1928.

Yours, etc., Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent, 27 William Street, Borough of Manhattan, New York City.

To Theodore L. Bailey, Esq., Proctor for Libellant, 15 William Street, New York City; Alex. Gilchrist, Jr., Esq., Clerk.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS TO LIBEL

Respondent, Charter Shipping Company, Ltd., excepts to the libel herein on the following grounds:

First. It appears from the libel and the exceptive allegations hereunto attached that both libellant and respondent are British corporations having their principal places of business in England; and that the general average adjustment has been made up by British average adjusters in England, namely, Messrs. Francis & Arnold, by reason

of which, on the facts stated in the libel, this court should not assume jurisdiction of this action.

Second. The facts stated in the libel do not constitute an admiralty and maritime cause of action within the jurisdiction of this court.

Dated New York, September 24, 1928.

Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent. Office and P. O. address: 27 William Street, Borough of Manhattan, City of New York.

[fol. 11] In United States District Court

[Title omitted]

Exceptive Allegations to Libel

Respondent, Charter Shipping Company, Ltd., for its exceptive allegations to the libel herein, alleges, upon information and belief, as follows:

First. Both libellant and the respondent are British corporations having their original places of business in England.

Second. The general average statement covering the voyage referred to in the libel has been made up by average adjusters in England, namely, Messrs. Francis & Arnold.

Third. By reason of the matters herein set forth, this court does not have jurisdiction of the subject matter of this action, nor should it assume jurisdiction of the parties on the matters set forth in the libel.

Dated New York, September 24, 1928.

Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent. Office and P. O. address: 27 William Street, Borough of Manhattan, City of New York.

[fol. 12] *Duly sworn to by Cletus Keating. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS EXCEPTIONS, ETC.

SIRS: Please take notice that upon the libel herein filed in the office of the Clerk of this Court July 16, 1928, upon the Notice of Appearance of the respondent, the Monition issued to the Marshal and the Marshal's return showing that he had arrested the Steamship "Charterhulme" on July 17, 1928, and upon the release and bond of the National Surety Company in the sum of Five thousand seven hundred fifty Dollars ($5,750.) showing the release of said Steamship "Charterhulme" from the arrest by filing of said bond, and upon the Exceptions to the Libel and the Exceptive Allegations of the Respondent, and upon the annexed affidavit of Theodore L. Bailey, proctor for libellant, and all proceedings herein, the undersigned will move this Court at a Stated Term for the hearing of motions, to be held in the Court Rooms in the United States Court [fol. 14] in the Woolworth Building, 233 Broadway, in the Borough of Manhattan, City of New York, on the 16th day of November, 1928, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing said Exceptive Allegations and dismissing said Exceptions to the Libel and directing that the Respondent file and serve its Answer to the Libel herein within fifteen days thereafter and in default thereof that decree be entered by libellant against the respondent pro confesso.

Dated New York, September 26, 1928.

Yours, etc., Theodore L. Bailey, Proctor for Libellant. Office and Post Office address: No. 15 William Street, Borough of Manhattan, New York City.

To Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent, No. 27 William Street, New York City.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF THEODORE L. BAILEY

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Theodore L. Bailey, being duly sworn, deposes and says: I am the proctor for the Libellant herein.

That this action was begun by the filing of libel on July 16, 1928, in personam, with prayer for writ of foreign attachment. That on July 17, 1928, monition was issued to the marshal for this District who under the writ of foreign attachment arrested the S. S. "Charterhulme" a vessel then lying in the harbor of New York owned by the respondent. That thereupon the respondent did serve and file his general (not special) appearance appearing by Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating as proctors, and did also file a bond of the National Surety [fol. 16] Company in the sum of Five thousand seven hundred fifty Dollars to release the said Steamship "Charterhulme" from such attachment, whereupon the said Steam- "Charterhulme" was so released by the marshal.

That a few weeks subsequent to the foregoing proceedings deponent is informed and believes that a suit was commenced by the respondent against the libellant in England alleging that a dispute had arisen between the parties, Bowring, Jones & Tidy, Ltd., claiming to be entitled to the relief prayed for in the libel herein, and asking that the Court award the Charter Shipping Company, Ltd., a declaratory judgment against Bowring, Jones & Tidy, Ltd.

That deponent verily believes that this English suit was commenced despite the fact that the present suit was already pending in the American Court and that said suit was commenced in the English Court in order to have the matters in dispute adjudicated in England so that the American Law, and especially the Harter Act, would not be applied.

This litigation grew out of shipments of American rosin by an American shipper from the American ports of Savannah and Brunswick, Georgia and Jacksonville, Florida,

under American bills of lading, on the Steamship "Charterhague," and as the shipments were from American ports to a foreign port, deponent verily believes that the Harter Act should be applied.

The bills of lading were American contracts issued at American ports by the Strachan Shipping Company as agents and freight was prepaid at these American ports. [fol. 17] As these bills of lading contained a clause providing for General Average the right of the Charter Shipping Company to collect General Average should be determined, deponent verily believes, under the American Law by the American Admiralty Court.

The General Average act under which the Charter Shipping Company claims its right to a lien against the cargo in General Average was a strand in the American port of Jacksonville at the commencement of the voyage and some of the witnesses in regard to such strand are within American jurisdiction. Libellant's contention regarding the strand is that it was due to the unseaworthy condition of the vessel and the failure of the engines and boilers to function properly.

Deponent also verily believes that the Charter Shipping Company will contend that the vessel was seaworthy before the commencement of the voyage (which libellant denies) in that she had been repaired prior to the voyage in a shipyard in Newport News by American repairmen who presumably would be witnesses, and surveyed at Newport News by a surveyor who would also presumably be a witness, within the American jurisdiction. This testimony would affect the log entries showing the salting of the boilers and leaks in boiler tubes and constant breakdown of engines prior to the voyage and during the voyage.

Deponent also believes that the Charter Shipping Company will contend that the SS. "Charterhague" was properly supplied (which libellant denies) in that the coal sup- [fol. 18] plied as bunkers at American ports just before the commencement of the voyage was of good quality. The witnesses as to this fact are also within American jurisdiction. The importance of this testimony is that the log entries disclose considerable difficulty with firing and maintaining steam.

The Charter Shipping Company will also contend that the said vessel was properly manned before the commencement of the voyage (whereas libellant contends that the chief engineer who sailed with the vessel on said voyage was too ill to attend to any of his duties) and presumably some of the witnesses as to the physical condition of the chief engineer just prior to sailing on the voyage will be residents of American ports.

That on September 25, 1928, respondent filed in this Court Exceptions to the Libel and Exceptive Allegations.

That respondent alleges as grounds for his exception:

(1) That both parties are British corporations.

But the American decisions holding that Admiralty (as distinguished from other Courts) will take jurisdiction as between two foreign corporations or parties are numerous and are cited in part in the memorandum of law herewith submitted.

(2) That a General Average Adjustment has been made up in England.

With this fact neither the libellant nor this Court is at all interested as the only matter in dispute is whether or not [fol. 19] under the American bills of lading constituting the contracts between the parties, the Charter Shipping Company as owner of the vessel, was legally entitled to collect any general average whatever from the libellant or was entitled to any lien upon libellant's cargo in General Average, and this question will be determined by the American Court under the American Harter Act in determining whether or not due diligence was exercised by the vessel owner before the commencement of the voyage to make the vessel seaworthy and properly supplied and manned.

Because of the several reasons hereinbefore stated it is submitted that this Court dismiss the Exceptions and Exceptive Allegations of the respondent and direct respondent to Answer the Libel herein.

Theodore L. Bailey.

Sworn to before me this 3rd day of October, 1928.
Elsa Muller, Notary.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM DECISION, THACHER, D. J.

(Notation on Motion Papers)

From the authorities it appears that Contribution for General Average is to be determined by the law of the port of discharge. Under all the circumstances the Court should therefore decline jurisdiction, and the Exceptions to the libel will accordingly be sustained.

T. D. Thacher, U. S. D. J.

December 1st, 1928.

[fol. 21] IN UNITED STATES DISTRICT COURT

99-147

BOWRING, JONES & TIDY, LTD., Libellant,
against
CHARTER SHIPPING COMPANY, LTD., Respondent

FINAL DECREE—Dec. 7, 1928

The respondent having filed exceptions to the libel herein, and the same having been moved for argument before this Court by libellant, and the said exceptions having been duly argued by counsel for the respective parties, at a Stated Term for the hearing of Admiralty Motions, held at the Court Rooms in the Woolworth Building, Borough of Manhattan, City of New York, on November 16, 1928;

Now, upon reading and filing the said exceptions and exceptive allegations of the respondent, the notice dated September 26, 1928, moving the same for argument, the affidavit of Theodore L. Bailey, duly sworn to October 3, 1928, [fol. 22] thereto annexed, with proof of service thereof on the proctors for the respondent, said affidavit being submitted in opposition to said exceptions and exceptive allegations, the libel, notice of appearance, monition and the Marshal's return, showing the arrest by him of the S. S. Charterhulme on July 17, 1928, the release by National Surety Company in the sum of $5,750., the affidavit of Cletus Keating, duly sworn to November 15, 1928, submitted in support of said exceptions, and due deliberation having been had thereon, and the Court having endorsed its memorandum in writing, dated December 1, 1928, sus-

taining said exceptions, and the costs of the respondent having been duly taxed at the sum of $98 92/100;

Now, on motion of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for the respondent, it is

Ordered that the respondent's exceptions to the libel herein be, and they hereby are, sustained; and it is further,

Ordered, adjudged and Decreed that the libel herein be, and it hereby is dismissed with costs; and it is further,

Ordered, adjudged and decreed that the respondent, Charter Shipping Company, recover of and from the libellant, Bowring, Jones & Tidy, Ltd., and its stipulators, the sum of $98 92/100, its costs as taxed, with interest thereon until paid; and that it have judgment and execution therefor; and it is further

[fol. 23] Ordered that unles this decree be satisfied, or an appeal be taken therefrom within ten days after service of a copy thereof on the proctor for the libellant execution may issue against the libellant and its stipulators for costs, their goods, chattels, credits and lands, to enforce satisfaction of this decree.

T. D. Thacher, U. S. D. J.

In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that Bowring, Jones & Tidy, Ltd., the libellant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the order and decree sustaining the respondent's exceptions to the libel herein, and dis-

[fol. 24] missing the libel with costs, entered herein the 8th day of December, 1928, and from each and every part of said decree.

Dated New York, December 17th, 1928.

Yours, etc., Theodore L. Bailey, Proctor for Libellant, 15 William Street, New York City.

To Alexander Gilchrist, Jr., Clerk; Kirlin, Woolsey, Campbell, Hickox & Keating, Esqrs., Proctors for Respondent, 27 William Street, New York, N. Y.

ALLOWANCE OF APPEAL

The foregoing appeal is hereby allowed.
Dated New York, December 19th, 1928.

F. J. Coleman, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

[fol. 25] The Libellant hereby assigns error to the proceedings, rulings, decisions, judgment, decree and order of the District Court in the above-entitled action, as follows:

1. In that the Court declined to retain jurisdiction.

2. In that the Court assigned as a reason for declining jurisdiction that contribution for general average is to be determined by the law of the port of discharge.

3. In that the Court failed to find that the bills of lading issued in America are American contracts and to be construed according to the American law.

4. In that the Court failed to find that the questions as to whether or not there was liability in general average on [fol. 26] the part of the ship to the cargo should be decided under the American contracts and the American Law, especially the Harter Act, as the shipments were from ports in this country to a port in a foreign country.

5. In that the Court dismissed the libel.

Dated New York, December 18, 1928.

Theodore L. Bailey, Proctor for Libellant, 15 William Street, Borough of Manhattan, New York City.

In United States District Court

[Title omitted]

Stipulation re Transcript of Record

[fol. 27] It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated March 15th, 1929.

Theodore L. Bailey, Proctor for Libellant. Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Respondent.

[fol. 28] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 29] In United States Circuit Court of Appeals for the Second Circuit

No. 340. October Term, 1928

Argued May 7, 1929. Decided June 10, 1929

Bowring, Jones & Tidy, Limited, Libel-ant-Appellant,

v.

Chaeter Shipping Company, Limited, Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Opinion

Appeal from the District Court for the Southern District of New York. Libel filed for the recovery of a deposit made to release a cargo from an alleged lien in general average. Exceptions were filed and the libel dismissed. Libel-ant appeals. Reversed.

Theodore L. Bailey, of New York City, for appellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, for appellee.

MANTON, Circuit Judge:

This libel seeks to recover a deposit made to secure the release of a cargo from an alleged general average lien. The deposit stood in the place of the released cargo, and, if there be no general average liability, the deposit must be released from the lien and delivered to the appellant, as consignee. Exceptions to the libel were filed, based on the claim that the court below had no jurisdiction. A writ of foreign attachment was issued, and the appellee's vessel, the steamship Charterhague, was arrested and subsequently released on filing a bond. Appellee filed a general appearance.

The cargo was shipped under three bills of lading, admittedly containing a general average clause, from ports of Georgia and Florida for British destination. The title passed to the consignee at the shipping port. The General Average Act under which the lien is claimed arose out of a strand in the port of Jacksonville, Fla., at the commencement of the voyage. Some of the witnesses necessary to prove the claim of negligence in the strand and unseaworthiness of the vessel are in the jurisdiction of the United States. Appellant claims the strand was due to the unseaworthy condition of the vessel, and the failure of the engines and boilers to function properly, and lack of due diligence by the appellee. Repairs were made at Newport News, and it is claimed that some repairmen from the plant will be necessary witnesses. Both the appellant and the appellee are British corporations. A general average adjustment has been made up in England.

The appellant argues that, although the bills of lading are not in evidence, they are of United States origin, and by their terms and the provisions of the Harter Act, the appellee was not entitled to general average as against this cargo, or the deposit made to obtain its release, and therefore, the District Court having obtained jurisdiction, and a general appearance having been interposed, the court should retain such jurisdiction. The general average statement made in England is not questioned, but the libel alleges that the vessel was unseaworthy and insufficiently supplied and manned at the commencement of the voyage, and therefore the vessel owner cannot recover from the cargo, relying upon the following authorities: The Jason, 225 U. S. 32,

32 S. Ct. 560, 56 L. Ed. 969; Hurlbut v. Turnure (D. C.) 76 F. 587, affirmed 81 F. 208 (C. C. A. 2); Trinidad Ship-
[fol. 30] ping Co. v. Frame, Alston & Co. (D. C.) 88 F. 528; Schr. Lewis H. Goward (So. D. N. Y. 1924), Ward J., 1924 A. M. C. 1251. In the latter case, the owners of a coal cargo filed a libel for breach of contract to carry the coal to the Azores. The ship put in at Bermuda in a leaky condition, and coal was ordered sold.

The court found that the cargo was accepted at Bermuda and the libel was not dismissed. The shipowners filed a cross-libel for general average, claiming that the exception of leakage qualified the warrant of seaworthiness. Ward, J., said: "Exceptions in a charter party or bill of lading do not apply to it (general average) unless they are expressly stated to do so." It was held that the exception relied on applied only to the contract of carriage and not to general average. To obtain general average contribution, the court said: "the burden lies upon him [the ship owner] to show that she was seaworthy when the voyage began, The Edwin I. Morrison, 153 U. S. 199 [14 S. Ct. 823, 38 L. Ed. 688], or that he was protected by the Harter Act, or by an exception reserving the right to contribution, and that he had exercised due care to make her seaworthy or that her unseaworthiness was not discoverable by due diligence. The Jason, 225 U. S. 32 [32 S. Ct. 560, 56 L. Ed. 969]."

Appellant goes not ask that a general average adjustment be restated, for such an adjustment has been made in England, but merely questions liability on the part of the cargo to the ship because of unseaworthiness. The bill of lading is not in the record, although referred to in the briefs. Where the contract between the parties provides for general average, the provisions of the bill of lading control. In the absence of some provision to the contrary in the bill of lading, the law or custom at the port of destination as to liability for general average prevails. If the bill of lading contains a Jason clause or other clause affecting the rights in general average, such clauses must be enforced. So, also, if it incorporates the provisions of the Harter Act. These questions we do not now determine. The case is here on dismissal, where exceptions to the libel were filed after a general appearance. It was discretionary with the court below to accept jurisdiction, even though the

parties be foreign corporations. The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152; The Kaiser Wilhelm der Grosse (D. C.) 175 F. 215

The affidavits show that the witnesses as to the seaworthiness of the vessel are American witnesses. If the bill of lading, as is asserted, contained a Jason clause, the question of the exercise of due diligence to make the vessel seaworthy might be a relevant fact to determine the liability of the vessel for a general average contribution. This the trial judge did not refer to. He placed his decision on the ground that general average was to be determined by the law of the port of discharge. This we think an insufficient reason, in view of the proof as to convenience of witnesses for declining jurisdiction. It was expedient, under all the circumstances, to exercise it. The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772; The Attualita, 238 F. 909 (C. C. A. 4); Fairgrieve v. Marine Ins. Co., 94 F. 686 (C. C. A. 8); Atkieselskabet Korn, etc., v. Rederiaktiebolaget, etc. (D. C.) 232 F. 403.

Decree reversed.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

BOWRING, JONES & TIDY, LIMITED, Libelant-Appellant,

v.

CHARTER SHIPPING COMPANY, LIMITED, Respondent-Appellee

DECREE—Filed June 17, 1929

Appeal From the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 32] File endorsement omitted

[fol. 33] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 34] Supreme Court of the United States

Order Allowing Certiorari—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,528. U. S. Circuit Court of Appeals, Second Circuit. Term No. 397. Charter Shipping Company, Ltd., petitioner, vs. Bowring, Jones & Tidy, Ltd. Petition for writ of certiorari and exhibit thereto. Filed September 14, 1929. File No. 34,528.

FILE COPY

SEP 14

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 397

CHARTER SHIPPING COMPANY, LTD.,
Petitioner,

against

BOWRING, JONES & TIDY, LTD.,
Respondent.

PETITION OF CHARTER SHIPPING COMPANY, LTD., FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

CLETUS KEATING,
Counsel for Petitioner.

Parkside Press, Inc., 32 Thomas St., New York, U. S. A.

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Supreme Court of the United States

No. , October Term, 1929.

Charter Shipping Company, Ltd.,
Petitioner,

against

Bowring, Jones & Tidy, Ltd.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, the Charter Shipping Company, Ltd., prays that a writ of certiorari issue to review a decree of the Circuit Court of Appeals for the Second Circuit (*R.* 32) entered June 17, 1929, reversing a decree in Admiralty of the United States District Court of the Southern District of New York (*R.* 21) sustaining exceptions to and dismissing the libel.

Jurisdiction.

The decree below was entered June 17, 1929.

Jurisdiction of the Court is provided by Section 347 (a) of Title 28 of the United States Code.

Opinions Below.

The opinion of the Circuit Court of Appeals was written by Judge Manton, Judges Swan and Augustus N. Hand

concurring, and appears on page 29 of the record. It is not yet reported.

The memorandum opinion of Judge Thacher appears on page 20 of the record. It is not reported.

The Questions Presented.

1. Where a District Judge (Thacher, J.) in the exercise of his discretion has declined to take jurisdiction in a suit in admiralty *in personam* between two British subjects, the subject matter of which is solely determinable by British law, may the Circuit Court of Appeals reverse the District Judge on the ground that the convenience of libelant's witnesses located at Norfolk and Savannah necessitated the trial of the case in the United States District Court for the Southern District of New York?

2. Where a District Judge has declined to take jurisdiction of a suit in admiralty between two foreigners with a common forum in a controversy solely determinable by the law of that forum, may the Circuit Court of Appeals reverse the District Judge and substitute its own discretion where the District Court has not erred in a matter of fact or wrongly applied a principle of law, or been guilty of an abuse of discretion?

3. May the Circuit Court of Appeals exercise the power of supervision over a matter resting upon the discretion of a District Judge where there has been no abuse of discretion but the Circuit Court of Appeals entertains a different view of how the discretion should have been exercised?

Statement of Facts.

The respondent, a British corporation, filed a libel *in personam* against petitioner, also a British corporation, to recover a general average deposit made in London.

The libel alleged that, in September, 1926, there were delivered to the petitioner at various United States Gulf ports and shipped on petitioner's vessel, the *Charterhague*, certain barrels of turpentine and rosin, for transportation to the Port of London (*fol.* 9); that agents for the petitioner issued bills of lading, acknowledging receipt of the goods and agreeing that the barrels of turpentine and rosin would be transported on the steamship *Charterhague* to the Port of London and there delivered unto the order of shippers; that thereafter the said bills of lading were endorsed and delivered to the respondent (*fols.* 10 and 11). The libel then alleges that before the steamship *Charterhague* arrived at the Port of London and before the respondent learned the facts of unseaworthiness, the petitioner's representative in London advised respondent that respondent's cargo would be liable on account of general average, and that a deposit of £1,334.2.9 would be required in order to release respondent's cargo (*fols.* 11 and 12). The libel then alleges that the respondent made the deposits requested with Messrs. Francis & Arnold, English General Average Adjusters, at London, and took delivery of the cargo there (*fol.* 14). It was then alleged that the respondent subsequently was informed that the *Charterhague* was unseaworthy at the beginning of her voyage and, therefore, respondent was under no liability on account of general average and that the amounts of the aforesaid deposits made in London are due and returnable to the respondent (*fols.* 14 and 15).

To this libel the petitioner filed exceptions, requesting the District Court in its discretion not to take jurisdiction, on the ground that both parties to the litigation were British corporations, having their principal places of business in England; and that the general average adjustment had been prepared in England and the deposits made there (*fols.* 28 and 29).

The libel and exceptions were all that was strictly before the District Court.

Before the matter was heard, however, by Judge Thacher in the District Court, Theodore L. Bailey, Esq., proctor for the libelant, filed an affidavit which appears at pages 15 to 20 of the record. This affidavit asserts a number of immaterial facts, most of which could not possibly have been within Mr. Bailey's personal knowledge (*fol.* 48). Mr. Bailey's affidavit states in part:

> "The bills of lading were American contracts issued at American ports by the Strachan Shipping Company as agents and freight was prepaid at these American ports. As these bills of lading contained a clause providing for General Average the right of the Charter Shipping Company to collect General Average should be determined, deponent verily believes, under the American Law by the American Admiralty Court.
>
> "The General Average act under which the Charter Shipping Company claims its right to a lien against the cargo in General Average was a strand in the American port of Jacksonville at the commencement of the voyage and some of the witnesses in regard to such strand are within American jurisdiction."

The affidavit then goes on to state a number of things which Mr. Bailey then believed that the petitioner would contend

and states that some of the witnesses with respect to these matters are located at Jacksonville and Newport News. Nowhere in the record is there to be found the bills of lading or any special contract respecting general average. What the general average clause referred to in Mr. Bailey's affidavit provides, if anything, does not appear.

The only matters before Judge Thacher were the libel, the exceptions and Mr. Bailey's affidavit. No general average clause changing the ordinary rules of law was submitted to Judge Thacher.

Judge Thacher sustained the exceptions and endorsed on the motion papers the following note (*fol.* 59):

> "From the authorities it appears that contribution for general average is to be determined by the law of the port of discharge. Under all the circumstances the Court should therefore decline jurisdiction and the exceptions to the libel will accordingly be sustained."

THE ACTION OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals reversed the decree below.

The Circuit Court of Appeals recognized that both parties to the litigation were British and that "*in the absence of some provision to the contrary in the bill of lading the law or custom at the port of destination as to liability for general average prevails.*" The Court also recognized that it was discretionary for the Court to accept or decline jurisdiction, citing the *Belgenland*, 114 U. S. 355. The Circuit Court of Appeals' reason for reversing Judge Thacher is contained in the last paragraph of the opinion, which states:

> "The affidavits show that the witnesses as to the seaworthiness of the vessel are American witnesses.

If the bill of lading, as is asserted, contained a 'Jason' clause, the question of the exercise of due diligence to make the vessel seaworthy might be a relevant fact to determine the liability of the vessel for a general average contribution. This the trial judge did not refer to. He placed his decision on the ground that general average was to be determined by the law of the port of discharge. This we think an insufficient reason in view of the proof as to convenience of witnesses for declining jurisdiction. It was expedient, under all the circumstances, to exercise it."

Two things are immediately apparent with respect to the opinion of the Circuit Court of Appeals:

1. It was not asserted before Judge Thacher that the bills of lading contained a "Jason" clause, nor will that statement or assertion be found anywhere in the record before this Court or the Circuit Court of Appeals.

The only place that statement was made was in a reply brief filed by Mr. Bailey before the Circuit Court of Appeals. The Circuit Court of Appeals accepted a statement made by respondent's counsel which was not made to the District Judge and which is not in the record, and criticized the District Judge for not considering it. How he could have considered something not before him is difficult to understand.

The so-called "Jason" clause varies a good deal. *Congdon on General Average,* Second Edition, page 48, states that the "Jason" clause in use at the present time reads as follows:

> "If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, it

is hereby agreed that in case of danger, damage or disaster, resulting from accident, or faults or errors in navigation, or in the management of the vessel, or from any latent defect in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from, or been occasioned by faults or errors in navigation, or in the management of the vessel, or any latent defect or unseaworthiness."

If the above or a similar "Jason" clause was contained in the bills of lading, it is obvious that the parties did not contract to have their rights determined by American law and not by British law. The above clause touches only one small angle of general average and would be applied by the British Courts in conjunction with all other British law affecting rights and liabilities in general average. The clause does not and could not oust British law as the law applicable to fix the rights of the parties with regard to the numerous and complicated matters involved in a general average situation.

2. The statement that the affidavits show that the witnesses as to the seaworthiness of the vessel are American

witnesses is untrue in part. The officers of the steamer, the petitioner's principal witnesses, are all British. The *Charterhague* operates between Gulf ports and London, England (Libel, *fol.* 8). Obviously, it is much more convenient for these witnesses to have the case tried in London. None of the witnesses on either side are located at New York. Furthermore, as the matter is governed by British law, petitioner will be obliged to examine a British barrister at considerable expense so that petitioner may establish in the United States District Court as a fact what the British law is respecting the matters in controversy between the parties. Moreover the average adjusters who prepared the average statement in accordance with British law are in London and the deposits sought to be recovered are in London.

The reasons of the Circuit Court of Appeals for reversing show clearly that that Court substituted its own discretion for that of the District Court; that in so doing, they erroneously believed that all the witnesses as to the seaworthiness of the vessel were American witnesses. Furthermore, they condemned the District Judge for not referring to the possibility that the bills of lading contained a "Jason" clause of unknown and unstated terms, which possibility was neither asserted before the District Judge nor was contained in the record before him or the Circuit Court of Appeals, nor is it in the record before this Court.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has laid down the rule that a District Judge is not justified in declining in his discretion to take jurisdiction of a libel *in personam* where both parties are British, and the subject matter of the con-

troversy is determinable under British law, if principal witnesses for the libellant are American. This rule will naturally be followed by District Courts and have very considerable bearing on the number of suits which are brought in this country by British shippers against British shipowners, in an effort by the former to obtain advantage of the more favorable American laws toward shippers, which they could not obtain at home.

2. The decision of the Court of Appeals in substituting their own discretion for the discretion of the District Judge is bad law, and constitutes an assumption of a supervisory power over matters which should rest solely in the discretion of the District Judge.

3. The Circuit Court of Appeals condemned Judge Thacher for not considering a matter not in the record, to wit, the "Jason" clause. It is pretty serious to lay down a rule asking District Judges to speculate on matters not before them and to take them into consideration in exercising discretion.

Respectfully submitted,

CHARTER SHIPPING COMPANY, LTD.,

By CLETUS KEATING,
Proctor of Record.

New York, September 11th, 1929.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

CLETUS KEATING.

Supreme Court of the United States

No. , October Term, 1929.

Charter Shipping Company, Ltd.,
Petitioner,

against

Bowring, Jones & Tidy, Ltd.,
Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

A reference to jurisdictional provisions, proceedings and opinions below is made in the petition.

The facts in the case are stated in the petition.

A. *The right to general average does not arise out of the contract of carriage as such.*

Arnould on Marine Insurance, Vol. II, in the note to Sec. 908, says:

> "The view best supported by judicial authority in this country is that the right arises not out of contract, but from the old Rhodian laws, and has thence become incorporated into the laws of England as the law of the ocean. *Cf. Burton* v. *English* (1883), 12 Q. B. D. 218; *Milburn* v. *Jamaica Fruit, etc., Co.* 1900), 2 Q. B. at pages 546 and 550 * * *. It is, however, the view which has been generally adopted in America (the right to general average does not arise out of contract). *The Roanoke,* 59 Fed. 161; *The Eliza Lines,* 61 Fed. 308."

In *Lowndes' General Average*, 6th Edition, Sec. 3, at pages 27-32, there is set forth quotations of numerous English decisions, in which the courts held that the right to general average does not result from the contract of carriage, but exists wholly independently of it. In *Milburn* v. *Jamaica Fruit etc. Co.* (1900, 2 Q. B. 540, Vaughan Williams, L. J., said:

> "The liability to contribute in no sense results from the contract of carriage, but exists wholly independently of the contract of carriage, by virtue of the equitable doctrine of the Rhodian law, which as part of the law maritime has been incorporated in the municipal law of England."

In *The Roanoke*, 59 Fed. 161 (C. C. A. 7th Cir.), Seaman, D. J., said at page 163:

> "The rule for contribution in general average is older than, and entirely aside from, the common law; is a rule both of equity and policy, which has come down through the centuries from an old Rhodian law, adopted in the Roman jurisprudence, and thence entered into the general maritime law. * * * This general average contribution is not dependent upon contract, but is 'built upon the plainest principles of justice,' (3 Kent Comm. 233,) and is aside from contract, (*The Eagle*, 8 Wall. 23:) 'It is the safety of the property, and not of the voyage, which constitutes the true foundation of general average.' *Insurance Co.* v. *Ashby*, 13 Pet. 331. The vessel is made to contribute, as well as the cargo saved, not because of its undertaking to carry, or out of any duty as carrier, but because it had encountered peril, and had been saved to the owners by a sacrifice of other property."

In the *Schr. Lewis H. Goward,* 1924 A. M. C. 1251 (S. D. N. Y.), Ward, Ct. J., said at page 1253:

> "But general average is entirely independent of the contract of carriage and arises as pure equity out of a sacrifice made or an expenditure incurred for the common benefit."

This principle was recognized as early as 1855 in the case of *Sturgess* v. *Carey,* 2 Curtis 383, in which case Curtis, J., said:

> "But this right to contribution does not arise from contract. It depends upon a principle of natural justice that they, who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure, should unite to make good the loss which that sacrifice occasioned."

See also:

The J. P. Donaldson, 167 U. S. 599 at 601;
Hobson v. *Lord,* 92 U. S. 397;
Barnard v. *Adams* (10 How. 270), 18 U. S. 393 at 397;
The Northern No. 30, 24 Fed. (2d) 975 at 976.

It will be seen, therefore, that it is a well established rule that the right to contribution for general average does not arise out of the contract of transportation, which, in this case, was the bill of lading, but exists entirely separate and distinct from it.

B. *General average is determined by the law of the port of destination.*

Authorities are unanimous to the effect that the law of the port of destination determines the rights and liabilities

arising out of the general average, subject to any special contract which may be made modifying the Port of Destination rules with respect to some particular phase of the general average.

Coe on General Average, page 60;
Congdon on General Average, 2nd Ed., page 148;
Lowndes on General Average, 6th Ed., page 296;
Sturgess v. *Carey,* 2 Curtis 383;
Peters v. *Warren Ins. Co.,* Fed. Cas. No. 11035;
Monsen v. *Amsinck,* 166 Fed. 817;
Hobson v. *Lord,* 92 U. S. 397 at 411;
Barnard v. *Adams* (10 How. 270), 18 U. S. 393 at 401;
Compagnie Francaise de Nav., etc. v. *Bonnasse,* 15 Fed. (2d) 202;
Minor v. *Commercial Union Assur. Co. Ltd.,* 58 Fed. 801;
National Board of Marine Underwriters v. *Melchers,* 45 Fed. 643;
Olivari v. *Thames & Mersey Marine Ins. Co.,* 37 Fed. 894;
International Navigation Co. v. *Sea Insur. Co.,* 129 Fed. 13 (C. C. A. 2nd Cir.).

Although the law of the port of destination governs the rights and liabilities arising out of a general average situation, the parties may contract to vary certain rules existing at the port of destination by incorporating the York Antwerp Rules of 1890 or of 1924 and by inserting one of the varying "Jason" clauses. *The Jason,* 225 U. S. 32.

The stipulation by contract of some particular condition to govern some phase of the general average which arises

does not mean that the law of the port of destination does not control the rights and liabilities. It means simply that the law of the port of destination operates on the general average and passes on the rights and liabilities arising therefrom, in the light of the contract the parties have made if they have made any.

Even assuming, therefore, that the bills of lading in this case contained one of the varying *"Jason"* clauses, it still remains for the law of the port of destination to determine the rights and liabilities arising from the general average, in the light of any special contract that the parties had made, with regard to any particular phase of the matter, and to apply its own general rules with respect to all the other matters in which the parties have not made a special contract. The so-called "Jason Clauses" covers only one small aspect of general average.

It is perfectly obvious that no Court can properly pass upon this case without proof as a fact what the British law is with respect to all phases of this general average and the deposits made thereunder. This Court has had considerable experience in general average cases and is aware of their complicated nature. Proof with respect to the British law which governs the situation will be difficult and expensive and the inconvenience of taking testimony in London either by an open or a closed commission would be very great.

C. *Principles of Discretionary Jurisdiction.*

In admiralty causes between foreigners where defendant has been brought within the jurisdiction of the Court, discretion is vested in the District Judge to take or decline jurisdiction. Long application of that discretion has resulted in certain settled principles. Diversity of nationality between the parties tends to invite assumption of

jurisdiction; identity of nationality, the refusal. "If justice will be done as well by remitting the parties to the home forum, the Court will not take cognizance of the case." *The Maggie Hammond*, 9 Wall. 435, 457.

In *The Belgenland*, 114 U. S. 355, the Court said, at page 363:

> "For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals."

Undue hardship, convenience of witnesses, as distinguished from parties, whatever might commend itself to the discretion of the District Judge are the tests commonly relied on to show the injustice of remission to the home forum. But considerations involving the interests of parties and witnesses must be balanced by considerations affecting the dominant convenience of the Court. The manner in which the District Judge must decide the case is a consideration properly to be regarded by the Trial Judge. If the case is determinable by the law of the forum, its decision presumably would be easy; if general maritime law controls, the source of decision is available; if the law of the parties' country controls, the Court must take proofs of that law and decide in accordance with the testimony. Obviously, it will be difficult for a District Judge, sitting in New York, to decide a complicated question of British general average by having the parties respectively examine British barristers on the subject. Why

should our congested courts hear controversies between non-taxpayers who have a common forum and law?

Exclusive power should be vested in the District Judge to weigh all the considerations presented. No consideration should be conclusive.

The Record before the District Judge in this case presented a cause in admiralty between British subjects, the subject matter of which was solely determinable by the law of Great Britain. The law of Great Britain had to be proven as a fact, which proof could only be obtained at great inconvenience and expense. The convenience of the libellant's American witnesses was offered as a reason for assuming jurisdiction. None of them reside in New York. The convenience of the petitioner's British witnesses was offered as a reason for not assuming jurisdiction. These witnesses are frequently in London. There was no proof of the existence of any special contract respecting any aspect of the general average before the District Court. Even if there was such proof and that proof had gone to the extent of showing a special contract that the general average should be entirely governed by American law, the matter of jurisdiction still rested within the discretion of the District Judge. But there was no such contract and no such question before the District Judge.

The Circuit Court of Appeals has attempted to exercise a supervisory power which they do not possess. They have gone the length of criticising a District Judge for not going outside the record and considering an immaterial matter of which he could have no knowledge. In so doing they have established a rule which will add a number of foreign cases to an already congested docket.

Even if the Circuit Court of Appeals had any discretion their action would be an abuse of it, for that Court

took into consideration and based their decision upon the existence of a fact not in the Record, to wit, the "Jason" clause. In effect they passed on a non-existent case which had never been before the District Judge.

Conclusion.

The opinion below places in the reports an extreme limitation on, if not a denial of, discretionary power of District Judges in admiralty suits between aliens. It sets up in a Circuit Court of Appeals' authority to make arbitrary reversals of discretionary decisions.

Review by certiorari should be had with a view to reaffirming the holdings of this Court unheeded by the decision below.

Respectfully submitted,

Cletus Keating,
Counsel for Petitioner.

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DEC 2
CHARLES ELMO

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 397.

CHARTER SHIPPING COMPANY, LTD.,
Petitioner,

against

BOWRING, JONES & TIDY, LTD.,
Respondent.

BRIEF FOR PETITIONER.

CLETUS KEATING,
Counsel.

New York, January, 1930.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Supreme Court of the United States

CHARTER SHIPPING COMPANY, LTD., Petitioner, *against* BOWRING, JONES & TIDY, LTD., Respondent.	OCTOBER TERM 1929. No. 397.

BRIEF FOR PETITIONER.

I. *Jurisdiction.*

This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, filed pursuant to the provisions of the United States Code, Title 28, Section 347 (a), on September 14, 1929, and granted on October 21, 1929.

II. *Opinions.*

The writ seeks to review a decree of the Circuit Court of Appeals for the Second Circuit which reversed a decree dismissing the libel entered on December 7, 1928, in the United States District Court for the Southern District of New York (R. 11).

The memorandum opinion of the District Court by Judge Thacher is not reported, but appears at page 11 of the Record.

The opinion of the Circuit Court of Appeals (Manton, J.) is reported in 33 F. (2d) 280, and is to be found at pages 14-17 of the Record.

III. *Statement of Facts.*

The respondent, a British corporation, filed a libel *in personam* against petitioner, also a British corporation, to recover a general average deposit made in London.

The libel alleged that, in September, 1926, there were delivered to the petitioner at various United States Gulf ports and shipped on petitioner's vessel, the *Charterhague*, certain barrels of turpentine and rosin, for transportation to the Port of London (R. 2); that agents for the petitioner issued bills of lading, acknowledging receipt of the goods and agreeing that the barrels of turpentine and rosin would be transported on the steamship *Charterhague* to the Port of London and there delivered unto the order of shippers; that thereafter the said bills of lading were endorsed and delivered to the respondent (R. 3). The libel then alleged that before the steamship *Charterhague* arrived at the Port of London and before the respondent learned the facts of unseaworthiness, the petitioner's representative in London advised respondent that respondent's cargo would be liable on account of general average, and that a deposit of £1,334.2.9 would be required in order to release respondent's cargo (R. 3). The libel then alleged that the respondent made the deposits requested with Messrs. Francis & Arnold, English General Average Adjusters, at London, and took delivery of the cargo there (R. 3). It was then alleged that the respondent subsequently was informed that the *Charterhague* was unseaworthy at the beginning of her voyage and, therefore, respondent was under no liability on account of general average and that the amounts of the aforesaid deposits made in London are due and returnable to the respondent (R. 4).

To this libel the petitioner filed exceptions, requesting the District Court in its discretion not to take jurisdiction, on the ground that both parties to the litigation were British corporations, having their principal places of business in England; and that the general average adjustment had been prepared in England and the deposits made there (R. 5, 6).

The libel and exceptions were all that was strictly before the District Court.

Before the matter was heard, however, by Judge Thacher in the District Court, Theodore L. Bailey, Esq., proctor for the libelant, filed an affidavit which appears at pages 8 to 10 of the Record. This affidavit asserts a number of immaterial facts, most of which could not possibly have been within Mr. Bailey's personal knowledge. Mr. Bailey's affidavit states in part:

> "The bills of lading were American contracts issued at American ports by the Strachan Shipping Company as agents and freight was prepaid at these American ports. As these bills of lading contained a clause providing for General Average, the right of the Charter Shipping Company to collect General Average should be determined, deponent verily believes, under the American Law by the American Admiralty Court.
>
> "The General Average act under which the Charter Shipping Company claims its right to a lien against the cargo in General Average was a strand in the American port of Jacksonville at the commencement of the voyage and some of the witnesses in regard to such strand are within American jurisdiction."

The affidavit then goes on to state a number of things which Mr. Bailey then believed that the petitioner would

contend and states that some of the witnesses with respect to these matters are located at Jacksonville and Newport News. Nowhere in the Record are there to be found the bills of lading or any special contract respecting general average. What the general average clause referred to in Mr. Bailey's affidavit provides, if anything, does not appear.

The only matters before Judge Thacher were the libel, the exceptions and Mr. Bailey's affidavit. No general average clause changing the ordinary rules of law was submitted to Judge Thacher.

Judge Thacher sustained the exceptions and endorsed on the motion papers the following note (R. 11):

> "From the authorities it appears that Contribution for General Average is to be determined by the law of the port of discharge. Under all the circumstances the Court should therefore decline jurisdiction, and the Exceptions to the libel will accordingly be sustained."

IV. *The Action of the Circuit Court of Appeals.*

The Circuit Court of Appeals reversed the decree below.

The Circuit Court of Appeals recognized that both parties to the litigation were British and that "*In the absence of some provision to the contrary in the bill of lading, the law or custom at the port of destination as to liability for general average prevails.*" The Court also recognized that it was discretionary for the Court to accept or decline jurisdiction, citing *The Belgenland,* 114 U. S. 355. The Circuit Court of Appeals' reason for reversing Judge Thacher is contained in the last paragraph of the opinion, which states:

> "The affidavits show that the witnesses as to the seaworthiness of the vessel are American witnesses.

> If the bill of lading, as is asserted, contained a Jason clause, the question of the exercise of due diligence to make the vessel seaworthy might be a relevant fact to determine the liability of the vessel for a general average contribution. This the trial judge did not refer to. He placed his decision on the ground that general average was to be determined by the law of the port of discharge. This we think an insufficient reason, in view of the proof as to convenience of witnesses for declining jurisdiction. It was expedient, under all the circumstances, to exercise it."

Two things are immediately apparent with respect to the opinion of the Circuit Court of Appeals:

1. It was not asserted before Judge Thacher that the bills of lading contained a "Jason" clause, nor will that statement or assertion be found anywhere in the Record before this Court or the Circuit Court of Appeals.

The only place that statement was made was in a reply brief filed by Mr. Bailey before the Circuit Court of Appeals. The Circuit Court of Appeals accepted a statement made by respondent's counsel which was not made to the District Judge and which is not in the record, and criticized the District Judge for not considering it. How he could have considered something not before him is difficult to understand.

The so-called "Jason" clause varies a good deal. *Congdon on General Average,* Second Edition, page 48, states that the "Jason" clause in use at the present time reads as follows:

> "If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied,

it is hereby agreed that in case of danger, damage or disaster, resulting from accident, or faults or errors in navigation, or in the management of the vessel, or from any latent defect in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from, or been occasioned by, faults or errors in navigation, or in the management of the vessel, or any latent defect or unseaworthiness."

If the above or a similar "Jason" clause was contained in the bills of lading, it is obvious that the parties did not contract to have their rights determined by American law and not by British law. The above clause touches only one small angle of general average and would be applied by the British Courts in conjunction with all other British law affecting rights and liabilities in general average. The clause does not and could not oust British law as the law applicable to fix the rights of the parties with regard to the numerous and complicated matters involved in a general average situation.

2. The statement that the affidavits show that the witnesses as to the seaworthiness of the vessel are American

witnesses is untrue in part. The officers of the steamer, the petitioner's principal witnesses, are all British. The *Charterhague* operates between Gulf ports and London, England (R. 2). Obviously, it is much more convenient for these witnesses to have the case tried in London. None of the witnesses on either side is located at New York. Furthermore, as the matter is governed by British law, petitioner will be obliged to examine a British barrister at considerable expense so that petitioner may establish in the United States District Court as a fact what the British law is respecting the matters in controversy between the parties. Moreover, the average adjusters who prepared the average statement in accordance with British law are in London and the deposits sought to be recovered are in London.

The reasons of the Circuit Court of Appeals for reversing show clearly that that Court substituted their own discretion for that of the District Court; that in so doing, they erroneously believed that all the witnesses as to the seaworthiness of the vessel were American witnesses. Furthermore, they condemned the District Judge for not referring to the possibility that the bills of lading contained a "Jason" clause of unknown and unstated terms, which possibility was neither asserted before the District Judge nor was contained in the Record before him or the Circuit Court of Appeals, nor is it in the Record before this Court.

V. *The Questions Involved.*

1. Where a District Judge (Thacher, J.) in the exercise of his discretion has declined to take jurisdiction in a suit in admiralty *in personam* between two British subjects, the subject matter of which is solely determinable by Brit-

ish law, may the Circuit Court of Appeals reverse the District Judge on the ground that the convenience of libelant's witnesses located at Norfolk and Savannah necessitated the trial of the case in the United States District Court for the Southern District of New York?

2. Where a District Judge has declined to take jurisdiction of a suit in admiralty between two foreigners with a common forum in a controversy solely determinable by the law of that forum, may the Circuit Court of Appeals reverse the District Judge and substitute its own discretion where the District Court has not erred in a matter of fact or wrongly applied a principle of law, or been guilty of an abuse of discretion?

3. May the Circuit Court of Appeals exercise the power of supervision over a matter resting upon the discretion of a District Judge where there has been no abuse of discretion but the Circuit Court of Appeals entertains a different view of how the discretion should have been exercised?

FIRST POINT.

THE RIGHT TO GENERAL AVERAGE DOES NOT ARISE OUT OF THE CONTRACT OF CARRIAGE AS SUCH.

Arnould on Marine Insurance, Vol. II, in the note to Sec. 908, says:

> "The view best supported by judicial authority in this country is that the right arises not out of contract, but from the old Rhodian laws, and has thence become incorporated into the laws of England as the law of the ocean. *Cf. Burton* v. *English* (1883), 12 Q. B. D. 218; *Milburn* v. *Jamaica Fruit, &c., Co.*

(1900), 2 Q. B. at pp. 546 and 550. * * * It is, however, the view which has been generally adopted in America (The right to general average does not arise out of contract). *Cf. The Roanoke* (1893), 59 Fed. R. 161; *The Eliza Lines* (1896), 61 Fed. R. 308, 325."

In *Lowndes' General Average,* 6th Edition, Sec. III, at pages 27-32, there are set forth quotations of numerous English decisions, in which the courts held that the right to general average does not result from the contract of carriage, but exists wholly independently of it.

In *Milburn* v. *Jamaica Fruit &c. Co.* (1900), 2 Q. B. 540, Vaughan Williams, L. J., said at page 550:

> "The liability to contribute in no sense results from the contract of carriage, but exists wholly independently of the contract of carriage, by virtue of the equitable doctrine of the Rhodian law, which as part of the law maritime has been incorporated in the municipal law of England."

In *The Roanoke,* 59 Fed. 161 (C. C. A. 7th Circuit), Seaman, D. J., said at page 163:

> "The rule for contribution in general average is older than, and entirely aside from, the common law; is a rule both of equity and policy, which has come down through the centuries from an old Rhodian law, adopted in the Roman jurisprudence, and thence entered into the general maritime law. * * * This general average contribution is not dependent upon contract but is 'built upon the plainest principles of justice' (3 Kent Comm. 233), and is aside from contract (*The Eagle,* 8 Wall. 23): 'It is the safety of the property, and not of the voyage, which constitutes the true foundation of general average'. *Insurance Co.* v. *Ashby,* 13 Pet. 331. The vessel is made

to contribute, as well as the cargo saved, not because of its undertaking to carry, or out of any duty as carrier, but because it had encountered peril, and had been saved to the owners by a sacrifice of other property."

In the *Schr. Lewis H. Goward,* 1924 A. M. C. 1251 (S. D., N. Y.), Ward, Cir. J., said at page 1253 (not reported elsewhere):

> "But general average is entirely independent of the contract of carriage and arises as pure equity out of a sacrifice made or an expenditure incurred for the common benefit."

This principle was recognized as early as 1855 in the case of *Sturgis* v. *Cary,* 2 Curtis 383 (Fed. Case No. 13,573) in which case Curtis, J., said:

> "But this right to contribution does not arise from contract. It depends upon a principle of natural justice, that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure should unite to make good the loss which that sacrifice occasioned."

See also:

The J. P. Donaldson, 167 U. S. 599 at 601;
Hobson v. *Lord,* 92 U. S. 397;
Barnard v. *Adams* (10 How. 270), 18 U. S. 393 at 397;
The Northern No. 30, 24 Fed. (2d) 975 at 976.

It will be seen, therefore, that it is a well established rule that the right to contribution in general average does not arise out of the contract of transportation, which in this case was the bill of lading, but exists entirely separate and distinct from it.

SECOND POINT.

GENERAL AVERAGE IS DETERMINED BY THE LAW OF THE PORT OF DESTINATION.

Authorities are unanimous to the effect that the law of the port of destination determines the rights and liabilities arising out of the general average, subject to any special contract which may be made modifying the port of destination rules with respect to some particular phase of the general average.

Coe on General Average, page 60;
Congdon on General Average, 2nd Ed., page 148;
Lowndes on General Average, 6th Ed., page 296;
Sturgis v. *Cary*, 2 Curtis 383;
Peters v. *Warren Ins. Co.*, Fed. Cas No. 11035;
Monsen v. *Amsinck*, 166 Fed. 817;
Hobson v. *Lord*, 92 U. S. 397, at 411;
Barnard v. *Adams* (10 How. 270), 18 U. S. 393, at 401;
Compagnie Francaise de Nav., etc. v. *Bonnasse*, 15 Fed. (2d) 202;
Minor v. *Commercial Union Assur. Co. Ltd.*, 58 Fed. 801;
National Board of Marine Underwriters v. *Melchers*, 45 Fed. 643;
Olivari v. *Thames & Mersey Marine Ins. Co.*, 37 Fed. 894;
International Navigation Co. v. *Sea Insur. Co.*, 129 Fed. 13 (C. C. A., 2nd Cir.).

Although the law of the port of destination governs the rights and liabilities arising out of a general average situ-

ation, the parties may contract to vary certain rules existing at the port of destination by incorporating the York Antwerp Rules of 1890 or of 1924 and by inserting one of the varying "Jason" clauses. *The Jason,* 225 U. S. 32.

The stipulation by contract of some particular condition to govern some phase of the general average which arises does not mean that the law of the port of destination does not control the rights and liabilities. It means simply that the law of the port of destination operates on the general average and passes on the rights and liabilities arising therefrom, in the light of the contract the parties have made if they have made any.

Even assuming, therefore, that the bills of lading in this case contained one of the varying "Jason" clauses, it still remains for the law of the port of destination (London) to determine the rights and liabilities arising from the general average, in the light of any special contract that the parties had made, with regard to any particular phase of the matter, and to apply its own general rules with respect to all the other matters in which the parties have not made a special contract. The so-called "Jason" clause covers only one small aspect of general average.

It is perfectly obvious that no court can properly pass upon this case without proof as a fact what the British law is with respect to all phases of this general average and the deposits made thereunder. This Court has had considerable experience in general average cases and is aware of their complicated nature. Proof with respect to the British law which governs the situation will be difficult and expensive, and the inconvenience of taking testimony in London either by an open or a closed commission would be very great.

THIRD POINT.

THE CIRCUIT COURT OF APPEALS DISREGARDED THE PRINCIPLES OF DISCRETIONARY JURISDICTION.

In admiralty cases between foreigners where a respondent has been brought within the jurisdiction of the Court, discretion is vested in the District Judge to take or decline jurisdiction. Long application of that discretion has resulted in certain settled principles. Diversity of nationality between the parties tends to invite assumption of jurisdiction; identity of nationality, the refusal. "The Court will not take cognizance of the case if justice would be done as well by remitting the parties to the home forum." *The Maggie Hammond,* 9 Wall. 435, at 457.

In *The Belgenland,* 114 U. S. 355, the Court said, at page 363:

> "For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals."

Undue hardship, convenience of witnesses, as distinguished from parties, whatever might commend itself to the discretion of the District Judge, are the tests commonly relied on to show the injustice of remission to the home forum. But considerations involving the interests of parties and witnesses must be balanced by considerations affecting the dominant convenience of the Court. The manner in which the District Judge must decide the case is a

consideration properly to be regarded by the Trial Judge. If the case is determined by the law of the forum, its decision presumably would be easy; if general maritime law controls, the source of decision is available; if the law of the parties' country controls, the Court must take proofs of that law and decide in accordance with the testimony. Obviously, it will be difficult for a District Judge, sitting in New York, to decide a complicated question of British general average by having the parties respectively examine British barristers on the subject. Why should our congested courts hear controversies between non-taxpayers who have a common forum and law?

Exclusive power should be vested in the District Judge to weigh all the considerations presented. No consideration should be conclusive.

The Record before the District Judge in this case presented a cause in admiralty between British subjects, the subject matter of which was solely determinable by the law of Great Britain. The law of Great Britain had to be proven as a fact, which proof could only be obtained at great inconvenience and expense. The convenience of the libelant's American witnesses was offered as a reason for assuming jurisdiction. None of them resides in New York. The convenience of the petitioner's British witnesses was offered as a reason for not assuming jurisdiction. These witnesses are frequently in London. There was no proof of the existence of any special contract respecting any aspect of the general average before the District Court. Even if there was such proof and that proof had gone to the extent of showing a special contract that the general average should be entirely governed by American law, the matter of jurisdiction still rested within the discretion of the Dis-

trict Judge. But there was no such contract and no such question before the District Judge.

The Circuit Court of Appeals have attempted to exercise a supervisory power which they do not possess. They have gone the length of criticizing a District Judge for not going outside the Record and considering an immaterial matter of which he could have no knowledge. In so doing they have established a rule which will add a number of foreign cases to an already congested docket.

Even if the Circuit Court of Appeals had any discretion, their action would be an abuse of it, for that Court took into consideration and based their decision upon the existence of a fact not in the Record, to-wit: the "Jason" clause. In effect they passed on a non-existent case which had never been before the District Judge.

The opinion of the Circuit Court of Appeals places in the reports an extreme limitation on, if not a total denial of, the discretionary power of District Judges to decline jurisdiction in admiralty suits between aliens and sets up in a Circuit Court of Appeals the authority to make arbitrary reversals of discretionary decisions.

The decision of the Circuit Court of Appeals is bound to invite alien litigants to avail themselves of the American admiralty courts whenever some particular litigant thinks that the American law or procedure would be more favorable to his case then the law of his home forum.

All the considerations which should determine whether jurisdiction should be taken or declined are properly matters within the discretion of the District Judge. If he exercises that discretion in good faith, in line with established legal principles, and upon the basis of the Record before him, his discretion should not be disturbed.

LAST POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED WITH COSTS.

Respectfully submitted,

CLETUS KEATING,
Counsel.

New York, January, 1930.

FILE COPY

FILED
OCT 3 1929
CHARLES ELMORE CRO
CLER

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929—NO. [redacted] 397

CHARTER SHIPPING COMPANY, LTD.,

Petitioner,

—against—

BOWRING, JONES & TIDY, LTD.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THEODORE L. BAILEY,
Counsel for Respondent.

THE COURT PRESS—Law Printers—47 West Street—Bowling Green 2820-1-4

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929—NO. 834.

CHARTER SHIPPING COMPANY, LTD.,
Petitioner,

—against—

BOWRING, JONES & TIDY, LTD.,
Respondent.

BRIEF IN OPPOSITION TO PETITION.

Statement of Additional Facts.

This action involves $5,750.

The opinion of the Circuit Court of Appeals in this case is reported in 33 Fed. Rep. (2nd Ser.) 280 and in 1929 American Maritime Cases 1116.

The petition does not deny that the cargo was shipped from American ports to a foreign port and, therefore, the Harter Act must apply, and the question of liability of the cargo in general average must be determined upon whether the strand was due to negligence or unseaworthiness or whether the vessel owner failed to use due diligence, before the commencement of the voyage from the American ports, to render the vessel seaworthy, properly equipped and manned.

But the petition fails to state that jurisdiction was secured in the Southern District of New York by the arrest under writ of foreign attachment by the United States Marshal of the SS. "Charterhulme", owned by the

petitioner, then lying in the New York harbor, and by the general (not special) appearance of the petitioner.

This action was brought for the recovery of a deposit made to secure the release of cargo from an alleged lien in general average. Such deposit stood in the place of the released cargo, and in the event that the Court determines upon the trial that there is no general average liability, such deposit (in lieu of the cargo) will be released from lien and delivered to the consignee, the respondent herein.

The strand which gave rise to the general average claim took place in the American port of Jacksonville. The cargo was American cargo shipped under American bills of lading, which upon the trial, will be shown to have incorporated the Harter Act and York Antwerp Rules of 1890, and also to have contained the Jason clause. Such bills of lading were issued by an American company as agent at American ports. The title to the cargo passed to the purchaser, the respondent herein, at an American port.

Some of the witnesses in regard to the strand and as to whether the same was negligent and due to unseaworthiness and lack of due diligence to make the vessel seaworthy, are within American jurisdiction (fols. 49-50).

The log entries show salting of the boilers and leaks in boiler tubes and constant breakdown of engines prior to the voyage and during the voyage (fol. 50).

The petition further fails to show that the construction of the Harter Act by English courts is different from that by the American courts.

The petition also fails to show that the rule in England as to the burden of proof as to due diligence is different from the rule in this country, nor does the petition show that the English Admiralty Court has no

jurisdiction to pass upon the question of liability in general average.

Furthermore, the petition omits to state that the respondent now holds security within the Southern District of New York (under the writ of foreign attachment), which security respondent will lose if the libel be dismissed.

The petition repeatedly states that the subject-matter is solely determinable by the British law, but in this the petition is clearly in error in that the only question in this case is whether the strand was negligent or caused by unseaworthiness or whether due diligence was used before the commencement of the voyage to make the vessel seaworthy, etc., as required by the American Harter Act and the bills of lading. The British law would not be permitted to vary the decision of this Court in *The Irrawaddy*, 171 U. S. 187, or to oust the Harter Act in requiring due diligence to have been used by the vessel owner before the commencement of the voyage, or to effect the construction of the American bill of lading by the American courts. This controversy is solely determinable by the American law.

Throughout the petition it is suggested that the Circuit Court of Appeals by reversing the District Judge, has criticized and condemned the District Judge, but such statement is not substantiated by the opinion, unless it can be said that each and every reversal constitutes a criticism of the Court so reversed.

At page 7 of the petition, it is suggested that numerous and complicated matters are involved in a general average situation. This is not correct, however, as to the instant case, where the only question involved is whether or not cargo is liable for any amount whatever in general average, *i. e.*, whether the strand was negli-

gent or whether due diligence was used by the vessel owner to make her seaworthy as required by the Harter Act and the bills of lading.

The libel alleges that the bills of lading were issued and upon the trial such bills of lading will be introduced in evidence. The libel also avers that all and singular, the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of the Honorable Court.

It is not essential to plead the bills of lading *in extenso*. The libel sufficiently pleads them by reference (fols. 9 and 10). The libel clearly raises the issue under the American Harter Act and under *The Irrawady*, 171 U. S. 187, and *The Jason*, 225 U. S. 32, as to whether the vessel was seaworthy (fol. 11), and due diligence had been used to render the vessel seaworthy, properly equipped and manned (fol. 14).

POINT I.

The decision of the Circuit Court of Appeals is in entire agreement with the decisions in this and other courts that have had occasion to deal with the question here presented.

The petitioner is desirous of having this suit tried in England. In fact, a few weeks subsequent to the beginning of this suit, petitioner filed in England a suit for a declaratory judgment. But as Judge Benedict has pointed out, the general rule is, that where there is a choice of forum, the libellant (respondent here) has the right of choice. *Chubb* v. *Hamburg-American Packet Co.*, 39 Fed. Rep. 431, 432.

Suitors in admiralty should not be compelled to resort to the home of the defendant, nor should they be prevented from suing in any District in which his goods or credits may be attached.

> "To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons *or his goods or credits attached*, would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice." (Italics ours.)
>
> *In re Louisville Underwriters*, 134 U. S. 488, 493.

Admiralty will take jurisdiction of suits between foreigners. *The Maggie Hammond*, 9 Wall. 435, 450, 451, 457; *The Belgenland*, 114 U. S. 355, 365; *Fairgrieve* v. *Marine Insurance Company*, 94 Fed. Rep. 687 (C. C. A. 8th Circuit); *Attualita*, 238 Fed. Rep. 909 (C. C. A. 4th Circuit); *Danielsen* v. *Entre Rios Rys. Co.*, 22 Fed. Rep. (2nd Ser.) 326, 327; *The Kaiser Wilhelm der Grosse*, 175 Fed. Rep. 215, 216.

Especially is this so where the case arises in the country of the forum.

In *The Belgenland*, 114 U. S. 355, this Court said, at page 363:

> "For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners *in cases not arising in the country of the forum;* as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a

> resort to its courts; or where they have agreed to resort to no other tribunals." (Italics ours.)

And at page 365:

> "But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *commune juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it."

In *The Maggie Hammond*, 9 Wall. 435, this Court said at page 451:

> "where the lien is given by the maritime law the question in such a case, in the admiralty courts of the United States, is not one of jurisdiction but of comity, as the jurisdiction to enforce a maritime lien for the breach of a contract of affreightment, either original or appellate, is, beyond controversy, conferred on all the Federal courts by the Judiciary Act."

The American Admiralty Court will take jurisdiction of a general average case, although the shipment was to a foreign port. *National Board of Marine Underwriters* v. *Melchers*, 45 Fed. Rep. 643, 645; *The Goward*, 1924 American Maritime Cases 1251.

Jurisdiction was had by the petitioners filing a general (not special) appearance. *Kaiser Wilhelm der*

Grosse, 175 Fed. Rep. 215, 216; *Benedict's Admiralty,* 4th Edition, Section 383.

Furthermore in the instant case a vessel of the petitioner was seized and attached within the territorial jurisdiction of the District Court for the Southern District of New York, pursuant to writ of foreign attachment.

A vessel owner is not entitled to contribution from cargo in general average in case of negligent strand or unseaworthiness. *The Irrawaddy,* 171 U. S. 187; *The Goward* (S. D. N. Y., 1924 Ward, J.), 1924 American Maritime Cases 1251, 1254; *Trinidad Shipping Co.* v. *Frame, Alston & Co. et al.,* 88 Fed. Rep. 528, 531; *Snow* v. *Perkins,* 39 Fed. Rep. 334, 335; *Hurlbut* v. *Turnure,* 76 Fed. Rep. 587, 589, affd. 81 Fed. Rep. 208, 211 (C. C. A. 2nd Cir.); *Gardner* v. *Bales Cotton,* 20 Fed. Rep. 529, 534; *Bowring* v. *Thebaud,* 42 Fed. Rep. 794, 800, affd. 56 Fed. Rep. 520, 522 (C. C. A. 2nd Cir.).

The bill of lading is an American contract and should be construed according to American law. *Liverpool, etc.* v. *Phenix Insurance Company,* 129 U. S. 397, 447, 448, 453, 461; *Yone Suzuki* v. *Central Argentine Ry.* (C. C. A. 2nd Cir. 1928), 27 Fed. Rep. (2nd Ser.) 795, 800; *The Majestic,* 60 Fed. Rep. 624, 627.

The American bill of lading controls the right to general average contribution.

In *The Jason,* 225 U. S. 32, this Court said at page 56:

> "Having already held that the general average clause contained in the bill of lading is valid as against the cargo-owner, it follows *ex necessitate* that it is valid in his favor."

The construction placed upon the Harter Act by the English court concerning general average, is quite different from the construction placed upon the same by the American court. *Lowndes on General Average* (1922), pages 32 *et seq.; Congdon on General Average* (1923), pages 29 *et seq.*

If respondent should be remitted to the English jurisdiction, it would be deprived of the liberal procedure of an admiralty court, inasmuch as the English Admiralty Court has no jurisdiction. *Maclachlin's Law of Merchant Shipping,* 6th Edition (1923), page 559; *Lowndes on General Average,* 6th Edition (1922), pages 412-417; *Pritchard's Admiralty Digest,* page 41.

The respondent bought and paid for American goods at an American port and shipped the same under an American bill of lading. Under such circumstances, the American Admiralty Courts will, pursuant to public policy, encourage foreign trade and the purchase of American goods by foreign customers. Admiralty Courts will not turn away foreign customers seeking protection in respect to American goods purchased in America and shipped from American ports under American contracts of carriage. When foreign customers invest in America and buy American goods and ship the same under an American contract of carriage, such customers are given the protection of the American bill of lading and Harter Act as construed by the American courts. Frequently, the Admiralty Courts of all countries are called upon to entertain jurisdiction of suits between aliens, arising out of collision and other incidents happening on the high seas where no American contract, no American statute, no American goods are involved.

The Circuit Court of Appeals properly reversed the

District Court. All that was necessary for the Circuit Court of Appeals to show, was one of the following:

(1) That the District Judge had exercised his discretion wrongfully, or

(2) That the District Judge had decided this case differently from the view which the Court of Appeals holds, or

(3) That the decision of the District Judge would have worked a failure of justice.

> *The Belgenland,* 114 U. S. 355, 368;
> *Heredia* v. *Davies,* 12 Fed. Rep. (2nd Ser.) 500, 501.

The only question involved in the present suit is whether the strand was negligent or whether the vessel owner used due diligence before sailing from an American port. It is implied in every contract of carriage of goods from an American port, that the shipment is subject to the terms of the Harter Act. *The Silvia,* 171 U. S. 462, 464, 465; *The Harter Act,* U. S. Compiled Statutes, Sections 8029-8031. The bills of lading in this case incorporated the Harter Act.

The American bills of lading properly regulated general average liability under the general maritime law and under the American law. *The Jason,* 225 U. S. 32, 41.

POINT II.

The application for writ of certiorari should be denied.

Respectfully submitted,

THEODORE L. BAILEY,
Counsel for Respondent.

FILE COPY

MAR 5 1
CHARLES ELMORE

Supreme Court of the United States.

OCTOBER TERM, 1929—No. 397.

CHARTER SHIPPING COMPANY, LTD.,

Petitioner,

—against—

BOWRING, JONES & TIDY, LTD.,

Respondent.

BRIEF FOR BOWRING, JONES & TIDY, LTD.

THEODORE L. BAILEY,
Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1929—No. 397.

CHARTER SHIPPING COMPANY, LTD.,
Petitioner,

—against—

BOWRING, JONES & TIDY, LTD.,
Respondent.

BRIEF FOR BOWRING, JONES & TIDY, LTD.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 14-17) is reported in 33 F. (2d) 280. The memorandum opinion of the District Court (R. 11) was not reported.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered June 17, 1929 (R. 32). Petition for certiorari was filed Sept. 14, 1929, and granted Oct. 21, 1929. Jurisdiction is conferred on this Court by Section 347 (a) of Title 28 of the United States Code.

Statute Involved.

The Harter Act, U. S. Compiled Statutes, Sections 8029-8031, Act of Congress approved February 13, 1893, Sections 1 and 2:

> "It shall not be lawful for the manager, agent, master or owner of any vessel transporting mer-

chandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. (Sec. 1.)

"It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. (Sec. 2.)"

Statement.

Bowring, Jones & Tidy, Ltd., respondent herein, brought this action in admiralty for recovery of a deposit made to secure the release of cargo from an alleged lien of the vessel owner in general average for damage to the vessel in getting off a strand. Respondent contends its cargo is not liable to contribute in general

average because of the unseaworthiness of the vessel, and the negligent strand.

In order to secure the release of its cargo, the respondent instead of depositing a general average bond, made the usual general average deposit which stands as a bond in place of the released cargo.

In the event that the Court determines that there is no general average liability on the part of the cargo to the vessel, such deposit (in lieu of the cargo) will be released from lien, and delivered to the consignee, Bowring, Jones & Tidy, Ltd. The petitioner (vessel owner) filed exceptions to the libel (R. 10) on the ground that the District Court had no jurisdiction.

The libel prayed writ of foreign attachment which was issued and pursuant thereto the marshal arrested the respondent's vessel, the S. S. "Charterhulme", which vessel was immediately released by the filing of a surety company bond in the sum of $5,750. The vessel owner filed a general appearance (not a special appearance) (R. 15).

The cargo was shipped from American ports to a foreign port, under three bills of lading (containing a general average clause and incorporating the Harter Act and York Antwerp Rules, 1890) which were issued at Savannah and Brunswick, Georgia and Jacksonville, Florida. The title to the cargo passed to the purchaser, the consignee, Bowring, etc., at an American port.

The general average act, under which the Charter Shipping Company claims its right to a lien against the cargo in general average, arose out of a strand in the American port of Jacksonville, Florida, at the commencement of the voyage. Some of the witnesses in regard to the strand and as to whether or not the same was negligent and due to unseaworthiness and lack

of due diligence to make the vessel seaworthy before the commencement of the voyage, are within American jurisdiction (R. 17). Cargo's contention regarding the strand is that it was due to the unseaworthy condition of the vessel and failure of the engines and boilers to function properly and due to the vessel's being out of control, and the failure of the Charter Shipping Company to use due diligence before the voyage.

Certain portions of the vessel had been repaired before the voyage in Newport News by American repairmen who presumably will be witnesses, and was surveyed at Newport News by a surveyor who also will presumably be a witness. Such testimony would seem to be essential to the vessel owner in order to meet the log entries showing the salting of the boilers and leaks in boiler tubes and constant breakdown of engines prior to the voyage and during the voyage (R. 17).

The log entries disclose considerable difficulty in firing and maintaining steam. Coal had been supplied at American ports and the witnesses as to these matters are within the American jurisdiction (R. 17).

The log entries disclose that the Chief Engineer was ill before and during the voyage and removed to hospital on arrival of the vessel in England. Some of the witnesses as to the physical condition of the chief engineer just prior to sailing will presumably be residents of American ports (R. 18).

The respondent was a customer who bought and paid for American goods at an American port and shipped the same under an American bill of lading. Under such circumstances our Admiralty Courts will, it is submitted, pursuant to public policy, encourage foreign trade and the purchase of American goods by foreign customers. Our courts will not turn away foreign

customers seeking protection in respect to American goods purchased in America and shipped from American ports under American contracts of carriage. When foreign customers come to our shores to invest and buy American goods and ship the goods home under an American contract of carriage, such customers should have the protection, it is submitted, of the American bill of lading and Harter Act, as construed by the American Courts. The American Admiralty Court frequently entertains jurisdiction over suits between aliens arising out of collision and other incidents happening on the high seas where no American contract, no American Statute or American goods are involved. Surely the American Admiralty Court will retain jurisdiction of a suit by a foreign customer and buyer of American goods shipped under an American bill of lading incorporating the American Harter Act, when the strand is in American waters.

The bills of lading contain the following clause incorporating the Harter Act:

> "(1) This shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled 'An Act relating to the Navigation of Vessels, etc.' This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States."

Even though the Harter Act were not incorporated, it would nevertheless be an implied part of the contract as the shipment was from a port in the United States to a port in a foreign country.

The petitioner argues that the bills of lading are not before the Court because the libel pleaded them by reference (as is customary) and did not quote these lengthy documents *verbatim*. At the proper time, that is upon the trial, the bills of lading will be introduced in evidence. The petitioner does not deny, and it well knows, that its bills of lading contained a general average clause, the Jason Clause, and incorporated the Harter Act and the York Antwerp Rules 1890.

The District Court declined to retain jurisdiction on the ground that "from the authorities it appears that contribution for General Average is to be determined by the law of the port of discharge". Even if so, the American Admiralty has in such cases retained jurisdiction. But, in the instant case, the Harter Act and the American law determine the liability or non-liability of the cargo to contribute in general average. The contract between the parties provides for general average, and the bills of lading control. The bills of lading provide (in the instant case) for adjustment according to the York Antwerp Rules of 1890 and such rules are applied regardless of what the law or custom at the port of destination may be. The bills of lading in the instant case contain a Jason Clause affecting the rights in general average, and such clause will be enforced regardless of law and usage at port of destination.

The petitioner alleged as grounds for its exception to jurisdiction (fols. 29 and 30):

(1) That both parties are British corporations.

The American decisions holding that Admiralty (as distinguished from other courts) will take jurisdiction

as between two foreigners, unless special grounds are shown for declining jurisdiction, are cited in part hereinafter.

(2) That a general average adjustment has been made up in England.

This is not in dispute, the only question being whether or not under the Harter Act, the American law, and the American bills of lading, the Charter Shipping Company was legally entitled (because of the unseaworthiness of the vessel) to collect any general average whatever from the cargo or is entitled to any lien in general average upon the cargo or upon the deposit which was given in lieu thereof when the cargo was released.

The Admiralty Court is asked by respondent to retain jurisdiction because of the convenience of witnesses; because justice requires that the cargo owner have the benefit of the Harter Act and of the construction of the bill of lading and the Harter Act by an American Admiralty Court, and further because Bowring, etc., now holds security (under writ of foreign attachment) which security libellant would lose if the libel be dismissed.

The Questions Involved,

are whether an owner of an unseaworthy vessel may, following a negligent strand at an American port, have any contribution from cargo in general average, and whether the voyage being from American ports to a foreign port, the American law, the Harter Act, and the bills of lading issued in America will determine this right, and whether the American Admiralty Court having secured jurisdiction will retain the same.

POINT I.

The vessel owner is not entitled to contribution from cargo in general average in case of negligent strand or unseaworthiness.

The only general average question in this case is whether or not the cargo is under any general average liability whatever to the vessel.

In *The Irrawaddy*, 171 U. S. 187, this Court held, in construing the Harter Act, that the vessel owner was not entitled to general average contribution from cargo in the event of a negligent strand. Mr. Justice Shiras wrote at page 189:

> "We shall first inquire why it is that, apart from the act in question, the owner of the ship is not entitled to a general average contribution where the loss was occasioned by the fault of the master or crew, and we find the rule is founded on the principle that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of some one for whose acts the claimant has made himself, or is made by law responsible to the co-contributors.
>
> * * * * * * *
>
> "Not only is the ship owner excluded from contribution by way of general average when the loss arises from the ship's fault, but he is legally responsible to the owner of the cargo for loss and damages so occasioned."

And at page 190:

> "Further, it has frequently been decided by this court that in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, * * *"

And at page 194:

> "It is said that it has been decided by the English courts that when, by a contract in the bill of lading, the ship owner is exonerated from liability for loss caused by the fault of the master or crew, he is entitled to share in a general average contribution."

And at page 195:

> "But whatever may be the English rulings as to the effect of contract immunity from negligence as entitling the ship owner to claim in general average, we do not think the cases are parallel. By the English law the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit. Very different is the case where a statute prescribes the extent of liability and exemption."

It would be unjust to deprive the cargo of the advantage of the American rule as opposed to the English rule.

To the same effect are:

The Goward (S. D. N. Y., 1924, Ward, *J.*), 1924 American Maritime Cases 1251, 1254;

Trinidad Shipping Co. v. *Frame, Alston & Co. et al.*, 88 F. 528, 531;
Snow v. *Perkins*, 39 F. 334, 335;
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Gardner v. *Bales Cotton*, 20 F. 529, 534;
Bowring v. *Thebaud*, 42 F. 794, 800, affd. 56 F. 520, 522 (C. C. A. 2nd Cir.).

POINT II.

The American contract (bill of lading) controls the right to general average contribution.

Though general average does arise independently of the contract of carriage, nevertheless it will be controlled by the contract clauses such as the clause incorporating the Harter Act, the Jason Clause and the clause providing for the York Antwerp Rules of 1890. These clauses will be applied regardless of the law and custom of the port of destination. The law of destination is ousted by the contract clauses to the contrary.

In *The Jason*, 225 U. S. 32, the bill of lading general average clause was in consonance with the Harter Act. This Court said at page 55:

> "since the clause contained in the bills of lading of the Jason's cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the provision in question is valid, and entitles him to contribution under the circumstances stated."

and at page 56:

> "Having already held that the general average clause contained in the bill of lading is valid as against the cargo-owner, it follows *ex necessitate* that it is valid in his favor."

The petitioner contends that the Jason Clause determines only one small aspect of general average. But that one small aspect is whether cargo is liable or is not liable, to the ship, in general average; and that is the only substantive question in this case. There is no general average question of any complicated nature, nor one requiring the testimony of any English barrister.

Judge Ward in *The Goward,* 1924 American Maritime Cases, 1251 (at p. 1253), said:

> "Exceptions in a charter party or bill of lading do not apply to it unless they are expressly stated to do so. This was the view taken by the English courts in *Schmidt* v. *Royal Mail Steamship Company,* * * *. But in later cases, the English courts held that if the charter party or bill of lading relieves a party from liability for negligence, his negligence cannot be considered a fault in general average proceedings * * *.
>
> "I think that the law of this country is like that of the earlier English cases. A shipowner whose negligence has contributed to a distress which caused the sacrifice or expenditure for the common benefit, can recover no contribution in general average from the cargo, *The Irrawaddy,* 171 U. S. 187, unless the right to recover is expressly reserved in the charter party or bill of lading. *The Jason,* 225 U. S. 32."
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> * * * * * * *
>
> "If the distress of the schooner was not due

to extraordinary weather, but to her inability to withstand weather ordinarily to be expected, her owner must bear the consequent loss, *Benner Line* v. *Pendleton,* 217 Fed. 497. The burden lies upon him to show that she was seaworthy when the voyage began, *The Edwin I. Morrison,* 153 U. S. 199, or that he was protected by the Harter Act, or by an exception reserving the right to contribution, and that he had exercised due care to make her seaworthy or that her unseaworthiness was not discoverable by due diligence, *The Jason,* 225 U. S. 32."

In that case the particular charter party under construction contained no clause affecting general average.

At page 9 of its brief, petitioner cites *The Roanoke,* 59 F. 161,—quite an old case decided at the time that bills of lading were simple documents consisting of little else than a receipt and of course not incorporating the Harter Act or other clauses effecting liability in General Average.

In the cases cited by petitioner at page 10 of its brief, to wit the *Sturgis, Donaldson, Hobson, Barnard* and the *Northern No. 30,* cases, there was no contract clause to guide or determine the question of general average liability and these cases were therefore properly decided independently of the contract. But those cases are not in point, inasmuch as there are relevant clauses in the bill of lading in the instant case and especially the clause incorporating the Harter Act, the Jason Clause and the York Antwerp Rules of 1890.

Petitioner cites Coe on General Average, who said at page 60:

> "It is immaterial where the adjustment is made."

This is true and many a foreign adjustment is made in the United States pursuant to court order and voluntarily by the general average adjuster. Of course such adjustments are made according to the law and custom of the place where cargo and vessel parted company except where the bill of lading or charter party otherwise provides; then, the contract provisions are properly applied by the general average adjusters regardless of the law or custom of the foreign port to the contrary.

Petitioner cites Congdon on General Average, 2d Ed., who said at page 148:

> "the adjustment of a general average loss occurring on the voyage is usually made at that port (destination), although not necessarily so, except that wherever it is drawn up, it must *apart from a valid agreement to the contrary,* be in accordance with the law, customs and usages of the port of destination, and York Antwerp Rules *when the latter are provided for in the contract of affreightment.*" (Italics ours.)
>
> * * * * * * *
>
> "Where the voyage is broken up at a port of refuge and a severance of interests occurs there, the adjustment, *in the absence of agreement to the contrary,* should be made in accordance with the law, customs, and usages at such port." (Italics ours.)

In the instant case the bill of lading, which was the agreement of affreightment, did make provision. The bill of lading incorporated The Harter Act, as well as the Jason Clause and the York Antwerp Rules of 1890. The bill of lading was issued at an American port cover-

ing cargo which had been purchased by respondent in America.

At page 11 petitioner cites Judge Holt's decision in *Monsen* v. *Amsinck,* 166 F. 817, but in the first portion of his decision, Judge Holt had based his decision on the construction of the American contract (the charter party), according to American law.

The average may be adjusted at the port of destination or may be adjusted elsewhere, but must be adjusted according to the law and usage at the port of destination *except* where the bill of lading or contract contains specific provisions. Then the provisions of the contract must be applied, any law or custom of the port of destination to the contrary, notwithstanding. It is not disputed that in the present case, wherever the adjustment might have been made, it would have been prepared according to the custom at the port where the cargo and vessel separated, in all matters of detail, except that the adjustment must be prepared according to the York-Antwerp Rules of 1890 inasmuch as the contract so provides, and *the question of liability or non-liability of cargo in general average must be determined under the Harter Act and the Jason Clause because the contract so provides and because the shipment was from a port in the United States to a foreign port.*

At page 11 of its brief petitioner contends that liability in general average is determined by the law of the port of destination even though this differs from the American law and petitioner cites cases supposedly in support of that contention. But in none of those cases was the question of liability under the Harter Act (either incorporated or unincorporated in the bill

of lading) involved. In the *Hobson* and *Barnard* cases no bills of ladings were involved. In the case of *Compagnie Francaise* v. *Bonnasse,* 15 F. (2nd) 202, a general average bond had been furnished. Both of the litigants were French, and motion to dismiss for lack of jurisdiction was made upon this ground. Judge A. N. Hand denied the motion. In *Minor* v. *Commercial Union Assur. Co.,* 58 F. 801, the Court construed the provisions relating to general average in the contract of insurance.

In *The National Board of Marine Underwriters* v. *Melchers,* 45 F. 643, cited by petitioner, the American admiralty retained jurisdiction.

In *Olivari* v. *Thames & Mersey Marine Ins. Co.,* 37 F. 894, both parties were foreigners. The voyage was broken up at Bermuda. Nevertheless the general average adjustment was stated at New York and Judge Benedict did not decline to retain jurisdiction.

In *International Nav. Co.* v. *Sea Insur. Co.,* 129 F. 13, the construction of the provisions relating to general average in the contract was involved.

POINT III.

The bill of lading is an American contract and should be construed according to American law.

Liverpool, etc. v. *Phoenix Insurance Company,* 129 U. S. 397, 447, 448, 453, 461;

Yone Suzuki v. *Central Argentine Ry.* (C. C. A. 2nd Cir. 1928) 27 F. (2nd Ser.) 795, 800;

The Majestic, 60 F. 624, 627.

The petitioner suggests it may take the testimony of an English barrister—for what purpose is not clear. But if the suit were remitted to a country other than America, respondent would have to prove the American Law as to liability or nonliability of the cargo in general average, under the facts of this case.

POINT IV.

Admiralty (as distinguished from other courts) will take jurisdiction of actions between foreigners, unless special grounds appear for denying it.

In *The Belgenland,* 114 U. S. 355, at page 363, Mr. Justice Bradley wrote:

> "For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners *in cases not arising in the country of the forum;* as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals." (Italics ours.)

And at page 365:

> "But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *commune juris,* that is, where they arise under the common law of nations, *special grounds should appear to induce the court to deny its aid*

> *to a foreign suitor when it has jurisdiction of the ship or party charged.* The existence of jurisdiction in all such cases is beyond dispute; the only question will be, where it is expedient to exercise it." (Italics ours.)

In the instant case, American goods were shipped from American ports, the bills of lading were issued in America, the strand occurred in an American port, and jurisdiction was had by the attachment in an American port of a vessel owned by petitioner.

In *The Maggie Hammond,* 9 Wall. 435, this Court said at page 451, by Mr. Justice Clifford:

> "Where the lien is given by the maritime law the question in such a case, in the admiralty courts of the United States, is not one of jurisdiction but of comity, as the jurisdiction to enforce a maritime lien for the breach of a contract of affreightment, either original or appellate, is, beyond controversy, conferred on all the Federal courts by the Judiciary Act."

Suitors in admiralty should not be compelled to resort to the home of the defendant, nor should they be prevented from suing in any District in which his goods or credits may be attached.

In the *Louisville Underwriters Case,* 134 U. S. 488, 493, Mr. Justice Gray said:

> "To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons

> *or his goods or credits attached,* would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice." (Italics ours.)

The respondent now holds security (the attachment bond), in America, which security will be lost if the libel be dismissed.

The S. S. "Charterhague" had not returned to an American port, after the voyage in suit, so that libel was filed in the District of New York, where a sister ship, the "Charterhulme", was found and attached. In fact, after the libel was filed, the "Charterhague" made only one voyage to Gulf ports. She also made a voyage to the port of New York, where petitioner could have taken the testimony of her officers, but did not see fit to do so. Since the voyage in suit, the "Charterhague" has either been laid up in ports other than English, or tramping in various parts of the world.

The same rule was followed in *Fairgrieve* v. *Marine Insurance Company,* 94 F. 686, 687 (C. C. A. 8th Cir.):

> "The objection to the jurisdiction of the district court is not tenable. Though the appellee is a foreign insurance company, its policy was issued at Chicago, in the State of Illinois, and no law of comity is violated by litigating any rights claimed under or growing out of the policy in the courts of the country where it was issued and by whose laws its validity must be determined. It is the settled law of this country that our Admiralty Courts have jurisdiction over suits between foreigners, if the subject matter of the controversy is of a maritime nature, and the ship

> or party to be charged is within the jurisdiction of the court. It is a jurisdiction the court may decline to exercise where, for some special reason, it appears to be inexpedient to exercise it, but there is no fact disclosed by this record that would justify the district court in declining to take jurisdiction of this case. 2 Pars. Mar. Law, 543; *Taylor* v. *Carryl*, 20 How. 611; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860; *Enos* v. *Sowle*, 2 Hawaii 332; *Warren* v. *The Benjamin Rush*, Id. 478."

In the *Attualita*, 238 F. 909, the C. C. A. 4th Circuit *per curiam* said:

> "It is said that in the exercise of a sound discretion jurisdiction should be declined. The ship flies a foreign flag. The libellant is a subject of another foreign monarch. The tort complained of was committed upon the high seas. We think this contention foreclosed by what the Supreme Court said in the Belgenland."

Judge Learned Hand in the case of *Aktieselskabet Korn-og Foderstof Kompagniet* v. *Rederiaktiebolaget Atlanten*, 232 F. 403, considered a libel in admiralty to recover damages for breach of charter party against the owner of the ship. The charter party was made in Denmark between Swedish and Danish corporations. The owner pleaded that this Court should not take jurisdiction of the cause on the ground that it was between two foreign corporations, but the Court took jurisdiction.

In the case of *Marine Insurance Company* v. *Elder Dempster & Company*, in which both the parties were

British corporations (decided January 1, 1922 but unreported) Judge Knox said:

> "As between the parties to this suit the convenience of one as to witnesses, etc., appears to be about as broad as that of the other is long. It is all too true that this Court is burdened with litigation to such a degree that justice moves with a leaden heel. Nevertheless, this Court is open to such litigants who may, under the law, and who desire to come here, and one case more or less upon our calendars is of little consequence. If the parties can stand the necessary delay this Court can do likewise. This suit's remaining here is within the Court's discretion, and I rather like the idea that we will exercise jurisdiction whenever we may properly do so."

In *Danielsen* v. *Entre Rios Rys. Co.*, 22 F. (2nd Ser.) 326, the Court said at page 327:

> "It is clear that whether an admiralty court will take jurisdiction of suits between foreigners is a matter entirely within its discretion, and such suits will be entertained, unless some special reason is shown why the court should deny its aid."

In *The Kaiser Wilhelm Der Grosse,* 175 F. 215, at page 216, Judge Hough said:

> "To decline jurisdiction of this cause would, I think, be a departure from the long-established practice of all admiralty tribunals in the United States. Almost the sole purpose of declining jurisdiction is to avoid the transaction of unnecessary business. If there be an additional reason, it is to be found in treaty obligations, which do not affect this cause. *Seizure* (or its legal equivalent)

> *of these vessels was effected within the territorial jurisdiction of this court, and all parties have appeared generally.*" (Italics ours.)

It will be recalled that in the instant case the S. S. "Charterhulme" was seized within the District of New York, and the appearance of the petitioner was general and not special. Thereby petitioner voluntarily submitted to the jurisdiction of the American Court (Benedict's Admiralty, 4th Ed., Sec. 383).

The suer, and not the sued, has the choice of forum. Judge Benedict, author of Benedict's Admiralty, in the case of *Chubb* v. *Hamburg Co.*, 39 F. 431, said:

> "The general rule is that, where there is a choice of forum, the libellant has the right of choice. To grant the defendant's application in this case would be to give to the defendant the right of choice."

POINT V.

Justice requires that the American Admiralty Court should retain jurisdiction of this cause.

The construction put upon the Harter Act by the English Courts in general average is quite different from the construction placed upon the same by the American Courts.

Lowndes on General Average (1922), pp. 32 *et seq.*;

Congdon on General Average (1923), pp. 29 *et seq.*

Furthermore the appellant if turned away from our courts would not only lose the benefit of the security which it now holds, and the benefit of the construction by the American Court of the American bill of lading and the American Harter Act, but would lose the advantage also of the liberal procedure of an Admiralty Court, as the English Admiralty Court has no jurisdiction.

Maclachlin's Law of Merchant Shipping, 6th Edition (1923), p. 559;
Lowndes on General Average, 6th Edition (1922), pp. 412-417;
Pritchard's Admiralty Digest, p. 41.

Again the rule in England as to burden of proof of unseaworthiness and the exercise of due diligence, is different from the rule in the American courts.

POINT VI.

An American Admiralty Court will take jurisdiction of a general average case involving adjustment according to law and usage of a foreign port.

Although respondent does not ask that a General Average Adjustment be stated or examined but merely that this Court determine whether or not cargo was liable at all in general average, nevertheless the following cases may be of interest.

In *National Board of Marine Underwriters* v. *Melchers*, 45 F. 643, the voyage was from Hamburg to New York, but was abandoned at Fayal where the ship and cargo parted company. Suit was brought by

cargo in New York for contribution due it in general average and another foreign vessel of the same ownership was arrested by writ of foreign attachment. The Court held that it had jurisdiction and in finding that the cargo and vessel parted company at Fayal, said:

> "It follows that the rights of the parties are to be determined by the rules prevailing at Fayal * * *."

The Court ordered the adjustment to be made here according to the customs and law at Fayal.

General Average Adjustments are frequently made in America according to the law and usage of the foreign port at destination.

In *The Goward,* 1924 American Maritime Cases 1251, the voyage was from New York to the Azores and Bermuda. Judge Ward held that there was no liability in general average because of the unseaworthiness of the vessel.

But, as has already been mentioned, the General Average Adjustment is not in question in this suit, but merely the question as to whether there was any liability whatever on the part of the cargo to the ship.

POINT VII.

The Circuit Court of Appeals properly reviewed and reversed the discretion exercised by the District Court.

The Belgenland, 114 U. S. 355, 368;
Heredia v. *Davies*, 12 F. (2nd Ser.) 500, 501.

By reviewing and reversing the lower Court, the Circuit Court of Appeals did not criticize or condemn the lower Court.

LAST POINT.

The decision of the Circuit Court of Appeals should be affirmed, with costs.

Respectfully submitted,

THEODORE L. BAILEY,
Counsel.

New York, March, 1930.

FILE COPY

APR 21 19
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 397

CHARTER SHIPPING COMPANY, LTD.,
PETITIONER,

against

BOWRING, JONES & TIDY, LTD., RESPONDENT.

MOTION TO DISMISS AND AFFIDAVIT IN SUPPORT THEREOF AND DECISION OF ENGLISH COURT HEREIN.

THEODORE L. BAILEY,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 397

CHARTER SHIPPING COMPANY, LTD.,
PETITIONER,
against
BOWRING, JONES & TIDY, LTD., RESPONDENT.

NOTICE OF MOTION TO DISMISS.

To CLETUS KEATING,
Counsel for Petitioner:

Please take notice that a motion to dismiss the writ in the above-entitled cause is about to be filed in the Supreme Court of the United States and that such motion will be submitted to the Supreme Court for consideration by the Clerk of that Court at the proper time, and that the grounds of the motion will be urged at the oral argument of this appeal.

A copy of the motion to dismiss is served upon you herewith.

THEODORE L. BAILEY,
Counsel for Respondent.

Service accepted this — day of April, 1930.

Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 397

CHARTER SHIPPING COMPANY, LTD.,
PETITIONER,

against

BOWRING, JONES & TIDY, LTD., RESPONDENT.

STATE OF NEW YORK,
County of New York, ss:

THEODORE L. BAILEY, being duly sworn, deposes and says that he is the proctor for the respondent, BOWRING, JONES & TIDY, LTD., in the above entitled appeal.

That this action was begun in Admiralty by the respondent Bowring, Jones & Tidy, Ltd., on July 16, 1928, in the United States District Court for the Southern District of New York, to secure the return of £1334.2.9, a deposit made in general average by Bowring, Jones & Tidy, Ltd., to Charter Shipping Company, Ltd., or its agents.

Upon information and belief, some weeks after this action was brought, an action for a declaratory judg-

ment was commenced by the petitioner, Charter Shipping Company, Ltd., against Bowring, Jones & Tidy, Ltd., in the King's Bench Division, London, England, in which action the Charter Shipping Company, Ltd., asked for a judgment that it might properly retain said deposit and in the same action, Bowring, Jones & Tidy, Ltd., counterclaimed for the return of said deposit.

Upon information and belief, during the pendency of this appeal in this Court on the question of jurisdiction, Bowring, Jones & Tidy, Ltd., made a motion in the English Court to stay the English action until this appeal, herein, could be decided.

But Charter Shipping Company, Ltd., opposed said motion and insisted that the English action be tried forthwith.

Upon information and belief, that thereupon the English action was tried on the merits during the course of several days and was decided by Mr. Justice Roche in the King's Bench Division. A copy of the decision as reported in *Lloyd's List and Shipping Gazette* on April 2, 1930, is attached hereto marked Exhibit A.

As the result of said decision the Charter Shipping Company, Ltd., must return about seven-eighths of said deposit to Bowring, Jones & Tidy, Ltd.

Although Bowring, Jones & Tidy, Ltd., chose this forum and opposed the trial of the action brought by petitioner in England involving the same facts, nevertheless, in view of the substantial justice done Bowring, Jones & Tidy, Ltd., in the action brought by the

Charter Shipping Company, Ltd., in the English Court, Bowring, Jones & Tidy, Ltd., has no desire to continue the present action, and it is believed that the decision of the English Court renders the present action moot.

WHEREFORE BOWRING, JONES & TIDY, LTD., prays that the writ of certiorari heretofore granted herein be dismissed, with costs to respondent in all Courts, and that Bowring, Jones & Tidy, Ltd., have leave to discontinue the action.

THEODORE L. BAILEY.

Sworn to before me this 19th day of April, 1930.

[SEAL.] ELSA MULLER,

Notary Public, Bronx County No. 100.

Bronx County Register's No. 3117.
Cert. filed in New York County No. 189.
New York Co. Register's No. 114162.
Commission expires March 30, 1931.

EXHIBIT "A."

KING'S BENCH DIVISION, TUESDAY, APR. 1, 1930.

Claim for General Average.

CHARTER SHIPPING COMPANY, LTD.

v.

BOWRING, JONES & TIDY, LTD.

Before Mr. Justice ROCHE.

The hearing of this action was continued today. The Plaintiffs, the Charter Shipping Company, Ltd., of Mount Stuart Square, Cardiff, claimed for a general average contribution alleged to be payable by the defendants, Messrs. Bowring, Jones & Tidy, Ltd., of Leadenhall Street, London, as owners of cargo ex plaintiff company's steamer CHARTERHAGUE. The defendants denied indebtedness, and counterclaimed for the return of a sum of £1203 14s. 2d. deposited by them, together with interest.

The previous proceedings were reported in Lloyd's List of March 22, 25, 26 and 27.

Mr. C. R. Dunlop, K. C. and Sir Robert Aske (instructed by Messrs. Holman Fenwick & Villan) appeared for the plaintiffs; Mr. G. P. Langton, K. C., and Mr. James Dickinson, K. C. (instructed by Messrs. Hill, Dickinson & Co.) represented the defendants.

The plaintiffs were indorsees of bills of lading for a considerable quantity of cargo which was shipped in the CHARTERHAGUE at Jacksonville, Gulf of Mexico, in October, 1926, and subsequently delivered

in London. Shortly after leaving Jacksonville the ship ran aground. She was refloated after being aground nearly three hours, and plaintiffs said that as the result of the accident her machinery, boilers, &c., were damaged. The defendants contended that the CHARTERHAGUE was not seaworthy when she left Jacksonville, and that if (which was not admitted), any general average sacrifice or expenditure was incurred, it was due to the vessel's unseaworthiness. Plaintiffs denied that the ship was unseaworthy when she started on the voyage.

Mr. Richard John Sladden, an official in the classification department of Lloyd's Register, gave evidence today. He stated that a certificate dated May, 1926, was issued on the satisfactory completion of the whole of the periodical special survey No. 1. That survey was completed at Glasgow in 1926, and the customary notation in the Register was assigned by the Glasgow Committee. Under no circumstances would the certificate have been issued unless both the hull and machinery surveys had been fully complied with. The Hamburg survey in December, 1926, to which reference had been made during the hearing, was purely a damage survey. It was not in the least a special survey.

Judgment.

Mr. Justice Roche, giving judgment, recalled the circumstances of the grounding of the CHARTERHAGUE, and said that on the subsequent voyage to London and Hamburg she made a very bad passage, and her engines and boilers worked very unsatisfactorily. She had to put in to more than one port of refuge by reason of shortage of coal, and other matters, and when she ultimately arrived at Hamburg it

was found that her boilers were in a state which could only be described as dreadful. They were water-tube boilers and they were a mass of scale. His Lordship said he was satisfied that the trouble with those boilers was not due to the grounding but to the treatment they had received at other periods of the vessel's career.

The claim of the plaintiffs was a claim in general average, and was based upon the York/Antwerp Rules, 1890, which Rules, by agreement between the parties contained in the bills of lading, were to apply and regulate the rights and liabilities of the parties in respect of general average. It was said on behalf of the plaintiffs that slight damage to the hull, a good deal to the machinery, and still more damage to the boilers, was brought about by the intentional working of the engines when the vessel was aground, in such circumstances that the vessel was in a position of peril, and in an endeavor to refloat her for the common interest. In answer to that several points were set up by the defendants. It was said, in the first place, that the vessel was not in a position of peril, that she was in no real danger, being in inland waters 20 miles from the sea, and that it was merely a matter or rising water and, if necessary, the assistance of a tug to get her off. He (his Lordship) held that while the danger was not very great, there was a position of peril within the meaning of the York/Antwerp Rules. The danger was really substantial enough to constitute the use of the engines and the risk of damage which they underwent, and the damage, if any, which resulted, damage within the meaning of the Rules.

The next point raised in opposition to the whole of the claim was that the vessel was unseaworthy and went ashore by reason of her unseaworthiness. The unseaworthiness alleged was in respect of her engines

and boilers, and it was said that in consequence she had not enough steam, and so got on a shoal. That story was vouched for in an affidavit or declaration by the pilot, but there was no other evidence of it. "I think" said his Lordship, "that there was some difficulty about getting up steam, but I cannot think that the master or pilot would really have started on the voyage with such a deficiency of steam as that which the pilot subsequently speaks of, and I cannot, of course, ignore the obvious fact that the pilot would naturally look around for some excuse for having got the vessel upon the ground, and I am not satisfied and I do not find that he is right when he charges want of steam. In consequence that point fails."

Then came the consideration what, if any of the large sums claimed by the plaintiffs were really due to efforts to refloat the vessel. Damage sustained by reason of the vessel going on the ground or while she was going on was not, of course, recoverable by the plaintiffs. It was only damage caused by endeavours to refloat in respect of which they could claim. With regard to the boilers, in the items of the plaintiffs' claim the amount allowed in general average was some 38,500 marks. In his view none of that was recoverable by the plaintiffs in general average. What was said for the plaintiffs, shortly, was that when the vessel was on the ground the main injection, and after that some of the other methods of getting water into the piping system of the ship were blocked with mud, and that there was, therefore, a shortage of water in the piping system. It was further said that the condenser got overheated and leaked, and that, in consequence, large quantities of salt water then, and still more in the course of the subsequent voyage, got into the boilers, and that that was the cause of the scale found at Ham-

burg. He was not satisfied of any of those necessary items of proof in the case. There was some obstruction of the injection, no doubt, but he was not satisfied that there was any great shortage of water in the piping system, and he was certainly not satisfied that it went so far, or that the engines were worked so long and so hot as to cause the condenser to leak. He did not believe that any large quantity of water got into the boilers from any such cause as that. On the other hand, he had come to the conclusion that these boilers were often fed with salt water, one of the very worst things for water tube boilers. Why it was that this course was adopted on each occasion that it was adopted he did not know, but in this connection he did not place the least confidence in the evidence which was given by the second engineer. In view of these circumstances, he was unable to attribute any part of the state of things found in the boilers at Hamburg to the efforts made to refloat the vessel, when she was aground at Jacksonville. That eliminated altogether the largest part of the plaintiffs' claim.

Next came the matter of the engines, and in this respect the plaintiffs had satisfied him that the vessel had gone through her No. 1 periodic survey, with regard to engines as well as hull, about a year before the casualty mentioned in the case. Nevertheless, he thought the greater part of the sum claimed in respect of the engines was not attributable to the efforts made to get the CHARTERHAGUE afloat. He could not avoid the conclusion—just as he thought the real facts about the boilers had not been told to him—that he had not been told the real facts about the engines, and that there was more trouble about the condition of those engines that one, at any rate, of the plaintiffs' witnesses would allow. The period for which the engines were worked at the time of refloating was, he thought,

very short, and the conditions were not nearly so bad as witnesses said they were.

His Lordship thought that if one-third of the amount set down by the plaintiffs was allowed in general average that would be quite enough. That was a figure which would be subject to any adjustment or correction which might be necessary. For repairs to the fittings of the ship and the hire of the tug, he thought the proper sum to allow was £50 in all. There would be something to be added for consequential items, dock dues and so forth. The parties must calculate those for themselves and allow proportionate amounts. Generally speaking, the parties must ascertain the total amounts due to plaintiffs on the lines which he had indicated. If they would do that they would have liberty to apply, and he would give judgment for the sum so ascertained by agreement. On the counterclaim, of course, the defendants would have to have judgment for the difference between the total amount ascertained and the £1203 14s. 2d. Each side would have to pay their own costs.

A full report of the Judgment will appear in *"Lloyd's List Law Reports."*

FILE COPY

APR 21 1930
CHARLES ELMORE CR
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 397

CHARTER SHIPPING COMPANY, LTD., PETITIONER,

against

BOWRING, JONES & TIDY, LTD., RESPONDENT.

BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI HERETOFORE GRANTED.

THEODORE L. BAILEY,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 397

CHARTER SHIPPING COMPANY, LTD., PETITIONER,

against

BOWRING, JONES & TIDY, LTD., RESPONDENT.

BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI HERETOFORE GRANTED.

There is no longer any actual controversy between the parties and the writ of certiorari heretofore granted should be dismissed.

The respondent moves to dismiss the writ of certiorari heretofore granted on October 21, 1929, on the ground that it has obtained substantially everything it could recover against the petitioner in this appeal by a decision of Mr. Justice Roche in the Kings Bench Division, reported in Lloyd's List & Shipping Gazette, April 2, 1930, a copy of which is annexed to the affidavit in support of this motion to dismiss. There are

no longer any rights of property actually controverted in the instant case, and the question has become moot. That petitions have been dismissed before by this court under analogous circumstances appears in the case of *California v. San Pablo and Tulare Railroad Company*, 149 U. S. 308, 313, 314 (1892), and cases cited therein. In the leading case of *Mills v. Green*, 159 U. S. 651 (1895), the court, by Mr. Justice Gray said at page 653:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect; and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsive evidence. *Lord v. Veazie*, 8 How. 251; *California v. San Pablo & Tulare Railroad*, 149 U. S. 308."

In the case of *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170 (1895), the court declined to hear further argument in the case, and the appeal was dismissed on the authority of *Mills v. Green* (159 U. S. 651), *supra*.

It is respectfully submitted that the writ of certiorari heretofore granted be dismissed for want of anything upon which it can operate. *Kimball v. Kimball*, 174 U. S. 158, 163 (1898), and cases therein cited.

The instant case does not involve a moot situation created by the intervention of a State Statute after a decision is rendered in lower court and before the questions are presented to this court. In such cases the meaning and effect of the State Statute was left for the determination of the State court. To leave the question free for the State court, the judgment below is invariably set aside, since the dismissal of the appeal might leave the judgment to be enforced as rendered. *State of Missouri ex rel. Wabash Railway Company v. Public Service Commission of Missouri*, 273 U. S. 126, 131 (1926). In the instant case the respondent is now ready to enter an order of discontinuance in the United States District Court for the Southern District of New York, where the suit originally commenced.

The American court obtained jurisdiction first. It would retain same, except for the moot situation caused by the prior English decision.

The court first obtaining jurisdiction of a controversy should be permitted to proceed without interference. *Hull v. Burr*, 234 U. S. 712 (1913). It has the right to proceed to final determination. *Mutual L. Ins. Co. v. Harris*, 96 U. S. 588 (1877). In the instant case, the English proceeding had commenced subsequent to the institution of suit in this country. The

English case, involving the same subject matter as in the instant case has already been decided, which in turn has created a moot situation. Moot questions require no answer. *Missouri K. & T. R. Co. v. Ferris*, 179 U. S. 602 (1900).

The moot situation arose despite respondent's effort to stay suit in England, in view of the suit having been first instituted in the American court. Costs should be awarded to respondent on this appeal and in the courts below as suit was properly brought by the respondent in the American court.

It is respectfully contended that costs be awarded to respondent on this appeal on the ground that the instant suit was commenced at a time prior to the commencement of the English suit. The fact that the earlier English decision compels respondent to move for a dismissal of the petition heretofore granted is not traceable to any act of misconduct on its part. Every step was taken in England to have the suit there await the outcome of the action in this country. The petitioners, having forcefully contended, in the English case, that no delay need suspend the course of the suit, have by their conduct, indirectly at least, caused a situation to arise, which respondent by its own acts sought to avoid.

Respectfully submitted,

THEODORE L. BAILEY,
Counsel.

New York, April, 1930.

SUPREME COURT OF THE UNITED STATES.

No. 397.—October Term, 1929.

Charter Shipping Company, Ltd., Petitioner, *vs.* Bowring, Jones & Tidy, Ltd.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 19, 1930.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent, a British corporation, filed in the District Court for Southern New York a libel *in personam* against petitioner, also a British corporation, to recover a general average deposit made in London. The libel alleged that the petitioner received on its vessel, the "Charterhague", at various Gulf and Atlantic ports in the United States, shipments of rosin and turpentine for transportation to London, bills of lading for which were endorsed to the respondent. As grounds for recovery it was set up that the general average act was due to unseaworthiness of the vessel at the beginning of the voyage, unknown to respondent when it made the deposit in order to release the cargo from the general average lien.

On the libel, the general appearance and exceptions of the libelee, the petitioner here, and an answering affidavit setting up that after the libel in the present suit was filed respondent commenced suit in England involving the same subject matter, the District Court dismissed the libel, saying that contribution for general average is to be determined by law of the port of discharge and that "under all the circumstances" jurisdiction should be declined. The Court of Appeals reversed, holding that the jurisdiction should have been retained. 33 F. (2d) 280. It pointed out that the suit did not involve a restatement of a general average adjustment and said that if the bills of lading contained a "Jason clause" or incorporated the provisions of the Harter Act, the question of due diligence to make the vessel seaworthy would be an issue in the case, citing *The Jason*, 225 U. S. 32; *The Edwin I. Morrison*, 153 U. S. 199; *Hurlbut* v. *Turnure* (D. C.) 76 Fed.

587, aff'd 81 Fed. 208; *Trinidad Shipping Co.* v. *Frame, Alston & Co.*, 88 Fed. 528; that the rule that general average is controlled by the law at the port of destination was consequently an insufficient reason for declining jurisdiction, and, in view of the statement of the affidavit that there were American witnesses as to seaworthiness, concluded that it was expedient under all the circumstances for the court to retain jurisdiction. This Court granted certiorari, 280 U. S. —.

The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed unless abused. *The Belgenland*, 114 U. S. 355, 368; *The Maggie Hammond*, 9 Wall. 435, 457.

The affidavit states that the bills of lading contain a clause providing for general average, but the bills of lading are not in the record and it does not appear that they embraced Jason or other clauses modifying the liability in general average. As that liability arises not from contract but from participation in the common venture, see *Hobson* v. *Lord*, 92 U. S. 397; *Barnard* v. *Adams*, 10 How. 270, 303; *The Roanoke*, 59 Fed. 161, 163; *Milburn* v. *Jamaica Fruit, &c. Co.*, (1900) 2 Q. B. 540, 550, its extent in the absence of such limiting clauses is, under the admiralty rule, fixed by the law of the port of destination. *Hobson* v. *Lord, supra*, 411; *Mousen* v. *Amsinck*, 166 Fed. 817, 820; *Compagnie Francaise de Navigation a vapeur* v. *Bonnase*, 15 F. (2d) 202, 203; Congdon, General Average (2d Ed.) 148. Even if so limited, the extent and effect of the limitation cannot be determined apart from consideration of the rule limited.

Both the parties being British subjects and the present litigation, as well as the suit pending abroad, apparently involving the application of English law to the fund located there, it was for the District Court to say, as it did, upon a consideration of all the circumstances, whether it should decline "to take cognizance of the case if justice would be done as well by remitting the parties to the home forum". See *The Maggie Hammond, supra*, p. 457.

Even if we assume, as did the court below, that the bills of lading may have modified the liability in general average so as to put in issue the care taken to make the vessel seaworthy before sailing, we cannot say that the District Court improvidently exercised its

discretion. While some witnesses as to seaworthiness were "American repairmen", it does not appear that any were in or near the southern district of New York. The libel alleges that the *Charterhague* plied as a common carrier between American ports and London where, so far as appears, her officers and crew would be available as witnesses as to the alleged unseaworthy condition of engines and boilers. It was for the District Judge to consider the facts appearing and the inferences which he might draw from them and reach his own conclusion as to the convenience of witnesses as well as the other factors upon which he decided that justice would be best served by leaving the parties to their suit in England.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.